91-329

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC.,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION;
UNITED STATES OF AMERICA
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges, may a shipper after having refused to pay those charges raise as a defense that they are unreasonable and have the court refer to the Interstate Commerce Commission the issue of the reasonableness of the rates sought to be collected?

And, if the above question is answered in the affirmative,

2. What proof is necessary to satisfy a trial court that a genuine issue of rate reasonableness is present so as to require it to stay proceedings and refer the issue to the Interstate Commerce Commission?

PARTIES TO THE PROCEEDING BELOW

Petitioner in the court below was Rebel Motor Freight, Inc., a Tennessee corporation, who was a motor common carrier regulated by the Interstate Commerce Act.

Appellees in the court below were the Interstate Commerce Commission and the United States of America.

Sunshine Mills, Inc., the shipper, who had originally caused the matter to be referred to the Interstate Commerce Commission was an intervenor as of right.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

GROUNDS FOR THE COURT'S JURISDICTION . . . 2

STATUTES INVOLVED 2

FEDERAL JURISDICTION 3

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD BE GRANTED 7

A. The Ruling Below Conflicts With Decisions Of This Court 7

B. The Federal Courts Are Unalterably Split On the Proper Construction Of The Interstate Commerce Act 18

C. The Act Does Not Address What Proof Is Required To Raise An Issue Of Rate Reasonableness 26

CONCLUSION 28

APPENDICES 1a

APPENDIX A 1a

APPENDIX B 8a

APPENDIX C 13a

TABLE OF AUTHORITIES

CASES

Page

Advance-United Expressways, Inc. v. Duro Metal Manufacturing Co., Civil No. CA3-89-2442-G 25

Advance-United Expressways, Inc. v. Eastman Kodak Co. 21

Arizona Grocery Co. v. Atchison T. & S.F.R. Co., 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 10,15,20

Atlantis Express, Inc. v. N & M Nationwide, Inc., 90-1815 and *The Bankruptcy Estate of United Shipping, Inc. v. National Automotive and Rubber Marketing, Inc.*, No. 90-1814 (November 23, 1990) 25

Branch Motor Express Co. v. Caloric Corp., No. 89-1130, slip. op. (3rd Cir., August 14, 1990) 7,18,26

Burlington Northern, Inc. v. United States, 459 U.S. 131, 103 S.Ct. 514, 74 L.Ed.2d 311 16

Clarence D. Robinson v. Baltimore & Ohio Railroad Co, 222 U.S. 506, 32 S.Ct. 114, 56 L.Ed. 288 8

Crancer et al v. Lowden et al, 315 U.S. 631, 62 S.Ct. 763, 86 L.Ed. 1077 (1942) 11,23

Davis v. Portland Seed Co. et al, 264 U.S. 403, 44 S.Ct. 380, 68 L.Ed. 762 (1924) 10

Delta Traffic Service, Inc. v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990) 21,23

In Re: American Freight System, Inc.,, 88-41050-11; *American Freight System, Inc. v. U.S. National Resources, Inc., a/k/a Friedrich Air Conditioning,*

Adv. No. 90-7248 (April 16, 1991) 26

In Re Sharm Express, Inc. Debtor. Edward Bergquist, Trustee In The Bankruptcy Estate of Sharm Express, Inc. v. 7/24 Sales, Inc., 122 B.R. 999 19

In the Matter of Caravan Refrigerated Cargo, Inc., Debtor. Supreme Beef Processors, Inc. v. Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S.Ct. 83 19

James G. Duffy, Trustee for Canny Trucking Co. v. BMC Industries, Inc. d/b/a Buckbee Mears Courtland Co., No. 91-7133 23

Louisville & N.R. Co v. Maxwell, 237 U.S. 94 (1915) 15

Lowden v. Simonds-Shields-Lonsdale Grain, 306 U.S. 516, 59 S.Ct. 612, 83 L.Ed. 953 (1939) . . . . . .11,20,23 . . . . .

Maislin Industries, Inc. et al v. Primary Steel, Inc., 497 U.S. _____, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) . . . . . passim

Mohasco Industries, Inc. v. Acme Fast Freight, Inc., 491 F.2d 1082, 1084 (5th Cir. 1974) 15

Pennsylvania Railroad Co. v. International Coal Mining Co., 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446 (1913) 10

Southern Pacific Trans. Co. v. San Antonio, TX, 748 F.2d 266 . . . . . .20 . . . . .

T.I.M.E. v. United States, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952 . . . . . passim

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907) 7

United States of America v. Associated Transport, Inc. et al, 505 F.2d 366 (D.C. Cir. 1974) 15

United States v. Western Pac. R.R. Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956) 23

STATUTES

28 U.S.C. §1254(1) 2
28 U.S.C. §1491 23
28 U.S.C. §2344 4
49 U.S.C. §6 12
49 U.S.C. §1320 17
49 U.S.C. §10701(a) 2
49 U.S.C. §10701(e) 6
49 U.S.C. §10705(c)(1) 3
49 U.S.C. §10761(a) 2
49 U.S.C. §11701(b) 3
49 U.S.C. §11705(b)(3) 2
49 U.S.C. §11706(a) 3

MISCELLANEOUS

Pub.L. 89-170, 79 Stat. 651, September 6, 1965 14

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INTERSTATE COMMERCE COMMISSION;
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rebel Motor Freight, Inc. prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this cause on May 28, 1991.

OPINIONS BELOW

The decision of the Court of Appeals was not recommended for full-text publication. It is reproduced as Appendix A hereto.

The ICC decision that was the subject of a Petition for Review in the Court of Appeals was issued in docket MC-C-30140, *Sunshine Mills, Inc. v. Rebel Motor Freight, Inc.* Its unreported decision appears as Appendix B hereto.

GROUNDS FOR THE COURT'S JURISDICTION

The decision of the Court of Appeals was entered on May 28, 1991. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C §10701(a) provides in relevant part:

> A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable.

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. §10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 11705(b)(3) of the Interstate Commerce Act,

49 U.S.C. §11705(b)(3) provides:

> A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

Section 11705(c)(1) of the Interstate Commerce Act, 49 U.S.C. §11705(c)(1) provides:

> A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under section (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

Section 11701(b) of the Interstate Commerce Act, 49 U.S.C. §11701(b) provides:

> A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle or a motor carrier or motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath.

FEDERAL JURISDICTION

The cause of action arose under Sections 10761(a) and 11706(a) of Title 49 of the United States Code. Jurisdiction of the United States Court of Appeals For the Sixth Circuit

was invoked pursuant to §2344 of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case is a continuation of the dispute discussed by this Court in its recently decided case of *Maislin Industries, Inc. et al v. Primary Steel, Inc.*, 497 U.S. _____, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). However, this cause arrives here on a procedurally different track.

Petitioner, Rebel Motor Freight, Inc. (hereafter Rebel), like Maislin, was a motor common carrier providing transportation services to the shipping public under a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission. It apparently made a private agreement with Sunshine Mills, Inc. (hereafter Sunshine), a shipper of dog food and related items, for a specific charge different from what was contained in the published tariff. Sunshine paid the lesser agreed upon rate and upon being billed the published tariff charge, refused to pay. Thereupon, Rebel sued Sunshine in the General Sessions Court of Shelby County, Tennessee for $6,007.60 representing the difference between the filed tariff rate and the rate actually paid. Sunshine offered no defense to the action and judgment for that amount plus pre-judgment interest was rendered in that court. Within the statutory ten day time limit Sunshine filed an appeal to the Circuit Court of Tennessee For The Thirtieth Judicial District at Memphis where it asked the court to stay the proceeding and refer to the Interstate Commerce Commission " . . . the issues of Rebel's applicable tariff rates and the reasonableness of its rate practices . . . for an initial determination of these issues pursuant to Ex Parte MC-177." In its Memorandum of Law in support of said Motion it asked the court to specifically refer three enumerated issues as follows:

> "1. Defendant Sunshine respectfully requests that this Court refer to the ICC the following issues: (1) The applicability of tariff

> rates; (2) whether the collection of the alleged undercharges constitutes an unreasonable practice; and (3) if an agreed upon rate is found to exist (as Sunshine believes the facts will show) and shipments were made under those agreed upon rates, whether the carrier should be permitted to collect a different amount."

The motion was granted and the cause referred to the Interstate Commerce Commission.

The case of *Sunshine Mills, Inc. v. Rebel Motor Freight, Inc.*, MC-C-30140 was handled before the Commission under its modified procedure resulting in a decision served July 31, 1989 in which the Commission relying upon its *Negotiated Rates* policy concluded that it would be an unreasonable practice to require Sunshine to pay undercharges for the shipments handled by Rebel pursuant to their negotiated agreement. There was no motion of the reasonableness of any rate nor was any evidence submitted to the Commission concerning same. The Commission's decision was appealed to the United States Court of Appeals for the Sixth Circuit on a Petition for Review in docket 89-3886, *Rebel Motor Freight, Inc. v. Interstate Commerce Commission et al.* That matter was held in abeyance pending this Court's decision in the *Maislin* case. After *Maislin* was decided, the appeal was then reinstated. Rebel relying upon this Court's decision in *Maislin* argued that the ICC's decision was contrary to law and should be declared null and void. The Interstate Commerce Commission waived its right to file a brief in this cause agreeing that the *Maislin*-decision controlled the unreasonable practice issue presented but stated that to the extent that an issue of the reasonableness of the rate remained, it should be remanded to it for consideration.

Intervenor Sunshine took the position that only the unreasonable practice issue was decided and since there had been no determination by the Commission of the reasonableness of the rates claimed that footnote 10 in the *Maislin* decision "requires now a reference to the ICC on unreasonable-

ness" and asked that it be re-referred to the ICC. Sunshine said that it would have been futile to have argued the reasonableness of the rates issue before the ICC since it was deciding cases under its *Negotiated Rates* policy on the unreasonable practice issue only. It then represented to the court that it had investigated the Memphis-Texas rates during the period October-December, 1983 and was "prepared to prove to the Interstate Commerce Commission by fact and expert evidence on each of the *Westinghouse* issues that the class rates asserted by Petitioner are basically and inherently unreasonable." It therefore sought remand to the ICC for a determination of the reasonableness of the rates, an issue it arguably did not have referred to the ICC in the first place, or, if it did, clearly waived when it did not present evidence on it to the Commission.

Rebel, in reply, responded that both the Interstate Commerce Act and Supreme Court precedent compelled a decision that this matter not be re-referred to the Interstate Commerce Commission on the reasonableness of the rate issue basically claiming that the scheme of the Interstate Commerce Act required first the payment of the tariff rate, and then, if the shipper believed the tariff rate to be unreasonable, it could seek reparations. Additionally, Rebel argued to grant Sunshine's motion to re-refer the case to the ICC would thwart the purpose of the filed rate doctrine; that the burden was on Sunshine to support a further stay in this cause which burden it had not sustained; that Sunshine had wholly failed to present any evidence as set forth in §10701(e) of the Interstate Commerce Act to establish even an inference that the rates sought were unreasonable; that Sunshine should be equitably estopped from asserting a matter it failed to pursue before the ICC; that Sunshine should not be allowed to change its defense on the appellate level; and that it would be grossly unfair and inequitable to require Rebel to recommence the litigation after having already waited over four years for its day in court.

The Sixth Circuit Court of Appeals believing there to be a conflict between "the rigidity of the filed rate doctrine

and the requirement that the rates be 'reasonable'" first determined that the ICC's decision could not be affirmed because of *Maislin* and its previous decision in *Orr v. Interstate Commerce Commission*, 912 F.2d 119 (6th Cir. 1990). It then pointed out the caveat in footnote 10 in *Maislin* stating that "The issue of the reasonableness of the tariff is open for exploration on remand", and, also the dissent of Justice Stevens to the effect that this Court's decision in *T.I.M.E. v. United States* "was greatly limited by this Court's subsequent decision in *Hewett-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88-89 [1962], and what remained of it was thereafter unambiguously repudiated by Congress." It further distinguished its decision from the post-*Maislin* decision of the Third Circuit Court of Appeals in the case of *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip. op. (3rd Cir., August 14, 1990) and reversed the ICC decision but remanded it for a determination of the reasonableness of the rate.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Ruling Below Conflicts With Decisions Of This Court

The essence of the question before the Court is whether a shipper may refuse to pay the filed tariff rate claiming it to be unreasonable. Petitioner respectfully submits that the shipper may not refuse to pay the filed tariff rate, otherwise it would be in violation of §10761(a) of the Act. It has always been the position of this Court that a common carrier must charge and receive in payment for its services only the filed tariff rate. If the shipper believes that rate is unreasonable, then it has been provided redress under the Act in the form of reparations, that is, damages to the extent that it has paid a charge that is subsequently determined by the ICC to have been unreasonable.

In 1907 this Court first addressed the power of the ICC to determine unreasonable rate cases and to award reparations in appropriate circumstances in the case of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907) where it said:

> ". . . a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the Act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alternation of an established schedule, because the rates fixed therein are unreasonable, ..." (204 U.S. at 444).

That case emphasized that a shipper must pay the legal, that is, filed rate and that the Act to Regulate Commerce embodied the common law right to be charged only a reasonable rate. The Act provided the only redress for a violation of that duty, and that redress was by way of reparations only.

On January 9, 1912 in the case of *Clarence D. Robinson v. Baltimore & Ohio Railroad Co*, 222 U.S. 506, 32 S.Ct. 114, 56 L.Ed. 288, this Court made absolutely clear its support for the reparations procedures as follows:

> "The act [specific citations omitted], whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, that act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative of the prohibi-

tions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorize the Commission to direct the carrier to desist from any violation found to exist, *and to make reparation for any injury found to have been done.* Provision was also made for the enforcement of the order for reparation by an action in the circuit court of the United States if the carrier failed to comply with it.

Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining, and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules *and by due reparation to injured persons.*

When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that

> a rate established in the mode prescribed should be deemed the legal rate, and *obligatory alike upon carrier and shipper until changed in the manner provided*, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure." (32 S.Ct. 115, emphasis ours).

Within the next year this Court had another case before it dealing with the proper redress for charging unreasonable rates to a shipper by way of reparations. In the case of *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446 (1913), this Court said:

> "If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparations." (33 S.Ct. 896).

This was the law in 1913 and is still the law in 1991. This case has never been overruled or diminished in any shape, form or fashion by this Court.

Subsequently in the case of *Davis v. Portland Seed Co. et al*, 264 U.S. 403, 44 S.Ct. 380, 68 L.Ed. 762 (1924), the court noted that for ten years the ICC had required proof of financial loss as a requisite to a reparations procedure and that Congress had not shown its disapproval of that interpretation. The court went on to state:

> "The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified." (24 S.Ct. 384-385).

This Court elaborated on the reparation procedure in 1932 in the case of *Arizona Grocery Co. v. Atchison T. &*

S.F.R. Co., 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 where it said:

> 'In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates; that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate--it was lawful only if it was reasonable. Under section 6, the shipper was bound to pay the legal rate; but, if he could show that it was unreasonable, he might recover reparation.' (284 U.S. at 384, 52 S.Ct. at 184).

Approximately ten years later this Court was faced with a shipper trying to stay an action in a lower court who sought to first have the ICC determine the reasonableness of the rate before court action was commenced. Sunshine is trying to do exactly the same thing in the instant case. In the case of *Crancer et al v. Lowden et al*, 315 U.S. 631, 62 S.Ct. 763, 86 L.Ed. 1077 (1942) in upholding the district and circuit courts' decisions not to stay and compelling the shipper to pay the full tariff charges this Court said:

> "We brought the case here because of the claim that the courts below sustained the jurisdiction of the District Court although the matter concerned called for the exercise of the

administrative discretion of the Interstate Commerce Commission, under the established rule first announced in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, as explained in Great N. Ry. v. Merchants' Elev. Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943." (62 S.Ct. 764).

* * *

"Second, petitioners contend that the District Court erred in denying their motion to stay proceedings in this case pending action by the I.C.C. in the second proceeding before the Commission."

* * *

"In their newly instituted proceeding, petitioners did not resurrect that dispute but confined themselves to the contention that the rates on pipe fittings were unreasonable as applied to their pipe thread protecting rings. The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them. 'Until changed, tariffs bind both carriers and shippers with the force of law. Under Section 6 of the Interstate Commerce Act [49 U.S.C.A. § 6] the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property. That section forbids the carrier from giving a voluntary rebate in any shape or form. This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less that the tariff rate. It is equally important to aid the efforts of the carrier in collecting published charges in full.

> Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.' *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520, 521, 59 S.Ct. 612, 614, 83 L.Ed. 953. Nothing involved in the pending administrative proceedings before the Interstate Commerce Commission was essential to the determination of the issue in this suit [which issue was the collection of the filed tariff rate.]" (62 S.Ct. 765).

These well established precedents requiring the shipper to pay only the filed tariff rate and thereafter to seek reparations if it thought the rate was unreasonable, were clearly in place when this Court was faced with the claim by a shipper of the unlawfulness of charges for past shipments by a motor common carrier. In 1959 this Court decided the case of *T.I.M.E. v. United States*, 359 U.S. 464, 79 S.Ct. 904, 3 L.Ed.2d 952. Prior to that time the ICC had set up a procedure whereby shippers such as Sunshine could petition the ICC for an order waiving undercharges. This procedure was challenged in the *T.I.M.E.* case. In that case a motor common carrier had sued the United States as shipper, to collect freight charges. The government defended on the grounds that the rates upon which the carrier relied were unjust and unreasonable. The United States Supreme Court there held:

> "The structure and history of Part II (the Motor Carrier Act), however, lead to the conclusion that here, as in the Federal Power Act, *Congress did not intend* to give shippers a statutory cause of action for the recovery of allegedly unreasonable past rates, *or to enable them to assert 'unreasonableness' as a defense in carrier suits to recover applicable tariff rates.*" (359 U.S. 470, italics ours).

It was asserted in *T.I.M.E.* that a defense existed by virtue of the language in former section 216(b) of the Act [the predecessor to present section 10701(a) upon which Sunshine re-

lies] requiring that a carrier's rates be reasonable. The court in *T.I.M.E.* held that the statutory duty to establish and observe reasonable rates created only a "criterion for administrative application in determining a lawful rate" rather than a "justiciable legal right" (359 U.S. at 469). Then, as now, the general requirement imposed upon common carriers by section 10701(a) to maintain reasonable rates, provides shippers no defense for a violation of that duty. The holding in *T.I.M.E.* left the purchasers of motor carrier freight services without any remedy whatever with respect to unreasonable rates on past motor carrier shipments.

In 1965, the 69th Congress created for the first time a limited remedy regarding the failure of a carrier to maintain just and reasonable rates. Pub.L. 89-170, 79 Stat. 651, amended then section 204(a) of the Interstate Commerce Act to provide a cause of action against motor carriers for recovery of "reparations" defined as "damages resulting from charges for transportation services to the extent that the Commission upon complaint made as provided in section 216(e) of this part . . . finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial." 1965 U.S. Code Cong. and Adm.News at 708, 712.

The legislative history indicates that Congress' response to *T.I.M.E.* was limited. Section 204a of the Act did not disturb the holding in *T.I.M.E.* except to allow the commencement of a reparations action for damages. Here, we have no countersuit claiming reparations. Nor could we because Sunshine has never paid the tariff rate.

The 1965 law is very specific in providing a remedy only where a shipper commences a proceeding to recover reparations. The narrow reparations remedy cannot be read in light of *T.I.M.E., supra*, as providing a defense to an action to collect tariff charges. Sunshine's suggestion seems to be that motor rates must be proven reasonable before they can be collected. This is incorrect. As noted by this Court on numerous occasions, a carrier's tariff rates are presumed

reasonable. *Maislin, supra* (1990); *T.I.M.E., supra* (1959); *Louisville & N.R. Co v. Maxwell*, 237 U.S. 94 (1915); *Arizona Grocery v. Atchison, T & S.F.R.*, 284 U.S. 370, 384 (1932).

With the amendment to the Act in 1965 shippers by motor common carrier were given a limited remedy of reparations which one circuit court has characterized as follows:

> "It necessarily follows that (that remedy) provides the sole and exclusive remedy for excessive charges." *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir. 1974).

Another United States Court of Appeals has arrived at a similar conclusion based upon similar circumstances. It the case of *United States of America v. Associated Transport, Inc. et al*, 505 F.2d 366 (D.C. Cir. 1974) the court discussed the 1965 amendment to the Motor Carrier Act as follows:

> "And although the Act declares excessive rates to be unlawful, Congress has now provided a procedure designed specifically for rectification of such excesses. By virtue of the 1965 amendment, a shipper may challenge a carrier's rates before the Commission and, if successful, may recover reparations in court. The frame and preamendment history of the Motor Carrier Act, as *T.I.M.E.* explains, evince a congressional intent to secure the reasonableness of rates through the administrative processes it prescribes, and to exclude liability of motor carriers to shippers on account of excessive rate-charging in the past. By the 1965 amendment, Congress has relented somewhat, *but only to the extent of admitting the current reparations procedure*." (Italics ours, 505 F.2d 368-369).

In more recent years this Court has made statements

indicating it still relies upon reparations as the proper method for shippers to receive refunds for overpayment of unreasonable tariff charges. In 1982 in the case of *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 103 S.Ct. 514, 74 L.Ed.2d 311, the Court made the following statement concerning reparations:

> "[W]here there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment." (103 S.Ct. 521).

And finally in the recently decided *Maislin* decision on the same page where this Court expresses the important caveat that the filed rate must be reasonable, said:

> "The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected, as commanded by §§10761 and 10762, the requirement that rates not be discriminatory, see 49 U.S.C. §10761, and the requirement of §10701 that carriers adopt reasonable rates and practices. As we explained in *Arizona Grocery, supra*, although the filed rate is the *legal* rate, the Act
>
> > 'did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate--it was lawful only if it was reasonable. Under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparations.'" (110 S.Ct. 2767).

The Court even referred to another case involving reparations in its footnote 11 being that of *Adams v. Mills*, 286 U.S. 397, 412, 52 S.Ct. 589, 593, L.Ed. 1184 (1932).

Numerous courts (including the court below), the Interstate Commerce Commission, and all shippers are currently taking the position that because of the caveat together with footnote 10 in the *Maislin* decision the proper course of action in cases of this type are to re-refer the issue of rate reasonableness to the Interstate Commerce Commission. In short, they reason that footnote 10 effectively overruled this long line of precedential decisions, as well as, the Interstate Commerce Act itself, concerning reparations. A list of cases known to petitioner in which a court or the Commission has taken the view that the Commission may determine the reasonableness of a rate even though the shipper has not paid same will be appended hereto as part of Appendix C. The Appendix will also list cases taking the opposite view.

Rebel respectfully submits that these parties are both misconstruing what this Court was saying in *Maislin*, as well as the Interstate Commerce Act. In addition, they are totally ignoring the precedents established by this Court in the cases cited heretofore. Both the Act and *Maislin* make it abundantly clear that it is the duty of carriers to establish just and reasonable rates under standards promulgated by the Interstate Commerce Commission. The shipping public, competing carriers and the Commission have the right to prevent those rates from going into effect by objecting to them and causing them to be investigated fully by the Commission before they become effective. Once they have become effective, however, they are binding on all parties. They are required to be paid in advance or only upon credit terms as promulgated by the Interstate Commerce Commission. See 49 C.F.R. §1320. If, after having paid them, the shipper believes that they are unreasonable, it has a second opportunity to contest their validity by initiating a complaint proceeding before the Interstate Commerce Commission under §11705(b)(3); and, if successful, can receive a refund of all amounts over what has been determined to be the reasonable rate, plus interest. In

this manner all shippers are treated alike and the purposes of the Act are fulfilled. Nothing in *Maislin* is to the contrary. It is respectfully submitted that the recent decisions by numerous courts including the United States Sixth Circuit Court of Appeals is a misapplication of this law. They are contrary to both the spirit and the exacting requirements of the "filed rate doctrine" (§10761(a)) of the Act. This Court is requested to grant certiorari to correct this error.

B. The Federal Courts Are Unalterably Split On the Proper Construction Of The Interstate Commerce Act

The United States Court of Appeals for the Sixth Circuit stated that:

> "Rebel's argument, which emphasizes that reparations provides for the only remedy, does not provide an opportunity for the ICC to address the reasonableness of rates[1]. As a carrier subject to the jurisdiction of the Interstate Commerce Commission, Rebel had an obligation under Section 10701 to keep its rates 'reasonable'. A remand to the ICC effectuates this purpose."

To be contrasted with this is the decision of the United States Court of Appeals for the Third Circuit where in the case of *Branch Motor Express Co. v. Caloric Corp.*, No. 89-1130, slip.op. (3rd Cir. August 14, 1990) in an almost identical fact and legal situation it refused to remand to the ICC the rate reasonableness issue because the shipper "never supplied any support for its proposition that [the carrier's] rates were unreasonable." Thus *Branch Motor* did not even mention the requirement to pay the rate first and seek reparations thereafter. It merely said that the case had already been before the ICC, that the shipper had the chance to pre-

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[1]The ICC addresses the rate reasonableness issue in a reparation case; indeed, that is the only issue to be decided.

sent its entire case the first time around and it was not going to allow it a second bite at the apple particularly in view of the fact that it had presented no evidence to support its unreasonableness claim[2].

The Sixth Circuit stated basically that it agreed with the Third Circuit that *Maislin* did not require a remand in every case where unreasonableness of rates was alleged. It preferred to make its decision upon the same basis as did the Third Circuit of whether the shipper was prepared to prove its unreasonableness charge.[3] Noteworthy, however, is the fact that the Sixth Circuit totally overruled the *T.I.M.E.* case and stated that "Sunshine is not required to pursue reparations as its sole remedy."

On the other hand, the Fifth Circuit Court of Appeals in the case of *In the Matter of Caravan Refrigerated Cargo, Inc., Debtor. Supreme Beef Processors, Inc. v. Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S.Ct. 83, said:

> "Thus, our precedent declares that a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the Commission. The rule is necessary

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[2]Compare this to the opposite result reached by the Sixth Circuit on virtually identical facts as quoted in the following footnote.

[3] In the instant proceedings Sunshine did not present one scintilla of evidence of rate unreasonableness either to the Circuit Court of Tennessee, the ICC or the Sixth Circuit. Rather in its Intervenor's Initial Brief before the Sixth Circuit it merely stated that it ". . . has investigated the Memphis-Texas rates during the period October-December, 1983. It is prepared to prove to the Interstate Commerce Commission by fact and expert evidence on each of the *Westinghouse* issues that the class rates asserted by Petitioner are basically and inherently unreasonable." The reference to the case mentioned is to the case of *Westinghouse Electric Corp. v. U.S.*, 388 F.Supp. 1309, a reparation case.

> to protect the filed tariff doctrine and its underlying policy of ensuring reasonable and non-discriminatory rates.
>
> Our decision here is an application of the same rule. A shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the commission. Any other decision would constitute legislation on our part; it would create an exception that swallows the doctrine and thereby would vitiate a long-standing and notorious policy which Congress has visited and left intact." (864 F.2d 391-392).

That case followed in line with another decision from the same Circuit being *Southern Pacific Trans. Co. v. San Antonio, TX*, 748 F.2d 266 in which it relied upon this Court's decision in *Pennsylvania Railroad, supra*, *Arizona Grocery, supra*, and *Lowden v. Simonds-Shields-Lonsdale Grain*, 306 U.S. 516, 59 S.Ct. 612, 83 L.Ed. 953 (1939), and said:

> "The Interstate Commerce Act, thus entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable." (748 F.2d 274).[4]

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[4]The ICC was a party litigant in this case. It there made exactly the same argument to the court as Rebel does in this petition, a position which it now apparently opposes before the Sixth Circuit in the instant proceeding. In the *San Antonio* case before the Fifth Circuit it agreed with the carrier in condemning the district court's decision to stay pending the ICC's determination of the rate reasonableness and said:

> "The district court erred, however, in staying execution of its judgment pending disposition of San Antonio's rate reasonableness

Petitioner is aware of another appeal pending in the Fifth Circuit being cause No. 91-1320, *Advance-United Expressways, Inc. v. Eastman Kodak Co.* involving the same identical question. In that case the United States District Court for the Northern District of Texas, Dallas Division granted summary judgment to the carrier and there said:

> "If Kodak seeks to raise as a defense that the filed rates themselves were unreasonable, it may do so before the ICC, but only after payment of the undercharges sued upon in this court. *Caravan Refrigerated Cargo, Inc.*, 864 F.2d at 391-92. As Justice Brennan wrote in *Maislin*, '[i]f strict adherence to §§10761 and 10762 as embodied in the filed rate doctrine has become an anachronism . . . , it is the responsibility of Congress to modify or eliminate these sections.' *Maislin*, 110 S.Ct. at 2771."

The United States Court of Appeals for the First Circuit seems to have led the way of those courts taking the position that a re-referral to the Interstate Commerce Commission without paying the filed tariff rate is the appropriate response to *Maislin*. In the case of *Delta Traffic Service, Inc. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990), that court said:

> claims before the Interstate Commerce Commission. The effect is to prevent the railroads from collecting the concededly applicable tariff rate pending final disposition by the Commission on San Antonio's rate reasonableness claims.
>
> * * *
>
> The district court's stay, rather than preserving the ICC's primary jurisdiction, potentially frustrates that jurisdiction, by creating an incentive for others to withhold payment of tariff rates.
>
> * * *
>
> The court erred in invoking the Commission's primary jurisdiction because, if anything, the court's stay frustrates rather than aids that jurisdiction, by effectively sanctioning San Antonio's refusal to pay the tariff rate." (Brief of ICC).

> "Because shippers may assert the unreasonableness of a rate as grounds for recovery in a reparations suit, courts ordinarily have permitted shippers to assert this same grounds as a *defense* in a *carrier's suit* to collect the filed ("legal") rate. [Citations omitted]. In such cases, the shipper may 'ask for a stay of the court proceedings and then ask the Commission to declare the [higher rate] . . . unreasonable.'"
>
> * * *
>
> "This legal regimen tends (1) to prevent carriers from favoring particular shippers by charging a lower-than-filed-tariff rate, (2) to protect shippers from having to pay a higher-than-reasonable rate, and (3) to permit the relevant expert body, the ICC, to make the relevant expert determinations." (902 F.2d 104-105).

Petitioner would observe that the ICC as the expert body has every opportunity to determine the reasonableness of the rate in a reparations case, a fact that the Sixth Circuit seems to overlook in the case sought to be reviewed herein. Furthermore, if Congress had sought to protect shippers from having to pay a "higher-than-reasonable" rate by allowing them a defense of unreasonableness, there would be no need to provide for a reparations procedure in the first place. The First Circuit recognized that it was diametrically opposed to the Fifth Circuit's position in *Supreme Beef* but for reasons stated in its opinion concluded that "We do not think the Supreme Court cases support the "no referral" rule adopted by the Fifth Circuit in *Supreme Beef*." The First Circuit then, like the Sixth, threw out this Court's decision in *T.I.M.E.* because of the 1965 amendment allowing reparations. The First Circuit concluded that:

> "It follows that motor shippers, like rail shippers, should be able to assert the unreasonableness of past charges as a *defense* in a carrier's suit for undercharges." (902 F.2d at 106).

A reading of the *Transtop* case shows that the First Circuit relies almost entirely upon this Court's decision in the case of *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956), where the Court of Claims had refused to refer to the ICC whether certain items were incendiary bombs and also whether the higher rate for incendiary bombs was reasonable. However, it should be recognized by the Court that the *Western Pacific* case was a Tucker Act case. Under the Tucker Act (28 U.S.C. §1491), the Court of Claims is specifically given "the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just." In short, the exact question presented in this case under the Interstate Commerce Act was not the same situation presented to this Court in the *Western Pacific* case under the Tucker Act. Furthermore, the *Western Pacific* case involved the United States Government as a shipper and the Interstate Commerce Act accords the government different treatment for offsetting overcharges it may have paid than it does commercial shippers such as is involved in this instant litigation.

In the recent case of *James G. Duffy, Trustee for Canny Trucking Co., Inc. v. BMC Industries, Inc. d/b/a Buckbee Mears Cortland Co.*, No. 1517, the United States Court of Appeals for the Second Circuit on June 28, 1991 had before it an interlocutory appeal from the District Court for the Northern District of New York which had stayed the proceeding and referred the issue of rate reasonableness to the Interstate Commerce Commission. The Second Circuit recognized that there was "disagreement among the circuits as to whether a shipper may contest the reasonableness of a filed rate prior to making payment according to its terms." In so stating it noted the cases of *Delta v. Transtop, supra, Supreme Beef v. Yaquinta, supra, In Re Sharm Express, infra,* as well as, *Crancer v. Lowden, supra, U.S. v. Western Pac., supra, and T.I.M.E., supra*. The Court noted that *Crancer* "casts considerable doubt on the authority of the district court to grant a stay and refer tariff challenges to the Commission prior to payment." It acknowledged the First Circuit's interpretation of *Western Pacific* but noted that since the First Circuit made

no mention of *Crancer* and because *Western Pacific* involved the United States as a shipper it was perhaps accorded an exception to the filed rate doctrine. In discussing *T.I.M.E.* and that it had arguably been legislatively overruled, since there was no mention of *Crancer* in that decision, it left the court "somewhat uncertain as to whether an unreasonable rate defense may generally be asserted by a private shipper prior to full payment." Based generally upon other grounds it held that the district court had not abused its discretion in referring the matter to the ICC but it is readily apparent from the Second Circuit's decision that the issue presented here by this Petition is clearly warranted.

A typical Federal District Court decision following the lead of *Transtop, supra*, is that of *In Re Sharm Express, Inc. Debtor. Edward Bergquist, Trustee v. 7/24 Sales, Inc.*, 122 B.R. 999 (1990) where the District Court for the District of Minnesota, Fourth Division, overruled the bankruptcy court which had refused to stay the cause and had granted summary judgment in favor of the carrier. In its Conclusions of Law the bankruptcy court had said:

> "That the issue of the unreasonableness of Sharm Express, Inc.'s filed tariff rates is not a defense to Plaintiff's undercharge action. Instead, rate reasonableness is a separate cause of action (a reparation action) which the Defendant has failed to utilize." (USBC, D MN).

On appeal and in reversing that decision the district court said:

> "The Court agrees with the First Circuit that allowing unreasonableness to be raised as a defense to a collection action does not undermine the purposes underlying the Interstate Commerce Act nor in any way involve courts in rate making properly assigned to the ICC."

Thus, in this one case, the Court may see the divergent

opinions of two judges looking at the same facts and the same law.

And yet, a judge in the District Court for the Fourth Judicial District of the County of Hennepin, State of Minnesota dealing with the same issue agrees with the bankruptcy court. In the case of *Atlantis Express, Inc. v. N & M Nationwide, Inc.*, 90-1815 and *The Bankruptcy Estate of United Shipping, Inc. v. National Automotive and Rubber Marketing, Inc.*, No. 90-1814 (November 23, 1990), the district judge said that:

> "The plaintiff has asserted that rate unreasonableness is not a defense to the underlying action for filed rate undercharges and this Court is inclined to agree. In order to dispute the reasonableness of the filed rate, the defendant must pursue a separate reparations action. This remedy was provided in 1965 after the T.I.M.E. decision left shipper without recourse for paying unjust rates. The reparations action can be brought only after the defendant has paid the undercharges."

And a Federal District Court for the Northern District of Texas, Dallas Division agrees. Judge Fish in the case of *Advance-United Expressways, Inc. v. Duro Metal Manufacturing Co.*, Civil No. CA3-89-2442-G said:

> "The Maislin Court, as well as the Fifth Circuit in Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989), have agreed that the ICA permits no deviation from the filed rates. If Duro Metal seeks to raise as a defense that the filed rates themselves were unreasonable, it may do so before the ICC, but only after payment of the undercharges sued upon in this court."

It is apparent that the courts disagree as to the proper interpretation and application of the rate reasonableness issue as

a defense to a carrier's suit seeking to secure judgment for the filed rate. This Court should grant certiorari to decide this issue.

C. The Act Does Not Address What Proof Is Required To Raise An Issue of Rate Reasonableness

The courts likewise differ as to what proof is required in order to have a court stay its proceedings and refer the issue of rate reasonableness to the ICC. This is because the matter was not addressed by Congress in the Interstate Commerce Act. Many of the courts recognize this dilemma. Bankruptcy Judge James A. Pusateri, judge of the Bankruptcy Court for the District of Kansas, recently noted that ". . . while it may seem preposterous that all the Shipper must do is to merely state that the Carrier's rate is unreasonable to be granted referral to the ICC, anything more, such as the standards set forth under 49 U.S.C. §10701(e) of the Interstate Commerce Act, would begin to infringe on the primary jurisdiction of the ICC." *In Re: American Freight System, Inc.,*, 88-41050-11; *American Freight System, Inc. v. U.S. National Resources, Inc., a/k/a Friedrich Air Conditioning*, Adv. No. 90-7248 (April 16, 1991).

The Sixth Circuit Court of Appeals in the instant proceeding seems to agree. See previous argument and particularly footnote 3, *ante*, where the only proof submitted to the court was an unsupported statement in a reply brief that the shipper was prepared to prove rate unreasonableness.

To be contrasted to this is the decision by the Third Circuit Court of Appeals in *Branch Motor Express, supra*, where it refused to remand and allow the shipper a second bite out of the apple because it had not presented any evidence to support its rate unreasonableness claim.

The *Branch* court seems to represent one end of the spectrum where it said:

> "Caloric's mere mention of rate unreasonableness, entirely unsupported even now, is not sufficient to give it a second bit at the apple. 'We remind counsel that phrasing an issue as a matter of tariff construction or as a question of reasonableness does not determine the issue of primary jurisdiction.... As the Supreme Court noted "[t]o hold otherwise would would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader."' Delta Traffic Service v. Occidental Chemical Co., 846 F.2d 911 (3d Cir. 1988) (quoting from United States v. Western Pacific R. Co., 352 U.S. 59, 69 (1956))."

Rebel then asks this Court that if it believes that a shipper may raise the unreasonable rate issue as a defense to its action seeking to enforce the filed tariff rate, what quantum of proof is necessary to satisfy a trial court that a genuine issue of rate reasonableness is present so as to require it to stay its proceedings and refer the issue to the Interstate Commerce Commission? This Court has said that it may not be done upon the whim of the pleader. Clearly, there is no evidence in the case Rebel seeks to have reviewed here other than the "whim of the pleader" making an unsupported allegation of what it intends to prove before the Commission. From the record it appears that all it is going to attempt to prove is that the filed tariff rate is higher than the negotiated and now rejected rate. Clearly that is not a statutory basis for unreasonableness.

It is respectfully submitted that the very fact that Congress did not give any standards or direction in the Act itself to those entrusted with enforcing it, should further enhance Rebel's argument that a defense of rate unreasonableness should not be allowed in the first place. If the shipper pays the filed tariff rate, and thereafter institutes a reparations proceeding, it has no such burden of telling a court what it hopes to prove before the ICC. It simply goes to the ICC with its complaint, presents what proof it has and allows the

Commission to decide the issue based upon all the evidence.

CONCLUSION

The issue presented in this case has already been answered in the case of *T.I.M.E. v. United States, supra*. However, since Congress did modify some of the holding in *T.I.M.E.* by legislative enactment in 1965, and since the caveat and footnote of this Court in its recent *Maislin* decision seem to emphasize the reasonableness of the rate rather than how one must go about bringing that issue before the Interstate Commerce Commission for determination, the *Maislin* decision rather than settling the issues presented in cases of this type, has allowed them to simmer and boil without resolution. There are literally hundreds of these cases still clogging the court system winding their way back to this Court for final resolution. It is believed that the only way to reasonably lay this issue to rest is to have this Court revisit the *Maislin* case and explain clearly and explicitly that although an issue of rate reasonableness may be ultimately involved, the only statutory framework by which a shipper may raise that issue is to pay the filed tariff rate and then institute a proceeding before the Interstate Commerce Commission for reparations if it considers itself to have been damaged thereby. Petitioner therefore requests this Court to grant this writ for certiorari and that same be issued to the United States Court of Appeals for the Sixth Circuit to the end that its decision be reversed and that of the Interstate Commerce Commission be held null, void and of no effect because there is no issue properly before it concerning the reasonableness of the rate at this time.

Respectfully submitted,

James N. Clay, III
222 E. Mallory Avenue
Memphis, TN 38109
Counsel of Record
for Petitioner

APPENDIX

APPENDIX A

No. 89-3886

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REBEL MOTOR FREIGHT, INC.	:	
Petitioner,	:	
v.	:	**ON PETITION FOR REVIEW OF A DECISION OF THE INTERSTATE COMMERCE COMMISSION**
INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA,	:	
Respondents,	:	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
SUNSHINE MILLS, INC.	:	Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be prominently displayed if this decision is reproduced.
Intervenor.	:	

Filed: May, 28, 1991

BEFORE: **JONES** and **SUHRHEINRICH**, Circuit Judges; and **JOINER,***, Senior District Judge.

PER CURIAM. Carriers operating in interstate commerce are required to file their rates with the Interstate Commerce Commission (ICC). 49 U.S.C. §10762(a)(1988). Furthermore, under the filed rate doctrine, carriers are only

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* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

permitted to charge the rate on file with the ICC:

> [A] carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff[.]

49 U.S.C. § 10761(a)(1988) (emphasis added). The clear duty of carriers to charge only rates on file is qualified in the Interstate Commerce Act by the requirement that rates "must be reasonable." 49 U.S.C. § 10701(a)(1988).

The case at bar is addressed to the conflict between the rigidity of the filed rate doctrine and the requirement that rates be "reasonable." Petitioner Rebel Motor Freight ("Rebel") was an authorized interstate carrier and filed its rates with the ICC. Intervenor Sunshine Mills manufactures dog food. In early 1983, Rebel agreed to transport Sunshine's products from Mississippi to Texas at a rate slightly below the filed rate. Sunshine was not aware that the billing rate was lower than the rate on file with the ICC. Rebel apparently charged below the rate on file in order to maintain a competitive edge over business rivals. Between October 6 and December 30, 1983, Rebel handled nine truckload shipments, and Sunshine paid the billed amounts.

Sunshine paid $6,007.60 less for the nine shipments than the Rebel rate on file with the ICC. Several years later, Rebel attempted to collect the $6,007.60 in "undercharges" in the face of liquidation. At this time Sunshine learned that the rate paid in 1983 was not published in a tariff.

Rebel filed suit in the General Sessions Court of Shelby County, Tennessee seeking to recover the $6,007.60 in transportation charges relating to the nine shipments in 1983.

Following judgment for Rebel, Sunshine appealed to the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis. On August 4, 1988, the Circuit Court stayed the proceedings and granted Sunshine's motion to refer the matter to the ICC to determine "whether the undercharges sought to be collected by plaintiff under all circumstances would be an unreasonable practice." J. App. at 17 (Order). On December 20, 1988, Sunshine submitted a brief to the ICC arguing that Rebel's action in attempting to collect the undercharges was an unreasonable practice under 49 U.S.C. §10701(a), which states that "[a] rate . . . must be reasonable."

Before the ICC, Rebel moved for dismissal on grounds that (1) the filed rate doctrine did not invite interpretations as to "reasonableness", and (2) under section 10761, Rebel had no authority to charge less than the rate specified in the tariff; therefore, the 1983 written rate agreement with Sunshine was void because it circumvented section 10761.

The ICC rejected Rebel's argument because of an ICC policy--known as "the Negotiated Rates[1] policy"--which provided that the filed rate doctrine does not necessarily bar defenses against a carrier's undercharge claim. J.App. at 54 (ICC Decision). The purpose of the Negotiated Rates policy was to "temper the harsh effects of the filed rate doctrine when it can be shown that the shipper and carrier negotiated and agreed upon a rate that was not published in a tariff." Id at 54. Because Sunshine and Rebel entered into a written agreement providing for a rate, the ICC concluded that it would be unreasonable to require Sunshine to pay undercharges now for the shipments handled by Rebel pursuant to their negotiated agreement. Id at 55.

On September 25, 1989, Rebel filed a Petition for Re-

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[1] The policy originated in a 1986 case in an attempt to temper the harshness of the filed rate doctrine. The ICC concluded that, in future referrals, the ICC would "decide if the collection of undercharges would be a reasonable practice." NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99, 100 (1986) (Negotiated Rates I).

view requesting this court to review the decision of the ICC. The case was held in abeyance pending our decision in Orr v. Interstate Commerce Commission, 912 F.2d 119 (6th Cir. 1990). In Orr, this court followed the Supreme Court's decision in Maislin Industries, U.S., v. Primary Steel, Inc., 110 S.Ct. 2759 (1990). In both Orr and Maislin, as in the instant case, a carrier attempted to recover freight undercharges from a shipper. In order to strengthen the filed rate doctrine, the Court in Maislin held that the ICC's Negotiated Rates policy was "flatly inconsistent" with the mandatory duty of carriers, as expressed in section 109761, to charge only rates properly filed. 110 S.Ct. at 2768.

In Orr, this court applied Maislin and "rejected the ICC's determination that collection of undercharges based on filed rates, after lower unfiled rates had been negotiated, constituted an 'unreasonable practice.'" Orr, 912 F.2d at 122. Orr remanded for a determination of the reasonableness of the tariff rates. Id.

Maislin and Orr clearly require reversal of the ICC's decision below. The only dispute is whether the case should be remanded back to enable the ICC to determine if the rate on file was reasonable. In this regard, we note that Maislin emphasized the statutory requirement that filed rates be "reasonable." Maislin, 110 S.Ct. at 2767 ("The filed rate doctrine, however, contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable.") A footnote in Maislin also suggests a remand may be appropriate if the reasonableness issue has not yet been addressed:

> The ICC did not determine whether the tariff rates were unreasonable even though respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates were reasonable. The issue of the reasonableness of the tariff rates is open for exploration on remand.

110 S.Ct. at 2767 n.10 (emphasis added). In Orr this court

remanded, after reversing a similar ICC decision, based on footnote 10 in Maislin. Orr, 912 F.2d at 122.

Rebel argues that the unreasonableness of tariff rates cannot be asserted as a defense to a shipper's obligation to pay the tariff rate, citing T.I.M.E. v. United States, 359 U.S. 464 (1959). In T.I.M.E., a carrier sued a shipper to collect freight charges. The shipper defended by asserting that the rates were unreasonable under the Motor Carrier Act. The Court held that Congress did not intend to enable shippers to assert "unreasonableness" as a defense in suits to recover tariff rates. Instead, the reasonableness requirement "creates only a 'criterion for administrative application in determining a lawful rate' rather than a 'justiciable legal right.'" 259 U.S. at 469 (citation omitted). In the wake of T.I.M.E., Congress amended the Interstate Commerce Act to enable shippers to recover reparations for unreasonable rates. Rebel concludes that Sunshine's only avenue to challenge the reasonableness of a rate after the shipment is through a reparations proceeding. See Mohasco Industries v. Acme Fast Freight, 491 F.2d 1082, 1084 (5th Cir. 1974) (applying T.I.M.E. for holding that statutory reparations remedy provided "the sole and exclusive remedy for excessive charges.").

Unfortunately for Rebel, the precedential value of T.I.M.E. has been greatly eroded. Justice Stevens acknowledged as much in his dissent in Maislin:

> [In] the 5-4 decision in T.I.M.E., . . . this Court prohibited district courts from staying collection proceedings pending agency review of the reasonableness of a filed rate. Although T.I.M.E. is strikingly similar to today's decision in a host of respects, the majority does not rely on it. Its reluctance to place any substantial weight upon T.I.M.E. is easily understood, because that precedent was greatly limited by this Court's subsequent decision in Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84, 88-89 [1962], and what remained of it was

> thereafter unambiguously repudiated by Congress.

Maislin, 110 S.Ct. at 2776-77 n.12 (Stevens, J., dissenting). Thus, T.I.M.E. is not dispositive of this case, and Sunshine is not required to pursue reparations as its sole remedy.

Rebel also relies on an unpublished post-Maislin case from the Third Circuit, Branch Motor Express company v. Caloric Corp., No. 89-1130, slip op. (3d Cir.Aug. 14, 1990). Branch Motor presented facts somewhat similar to the case at bar. The Third Circuit did not remand to the ICC on the reasonableness issue because the shipper "never supplied any support for its proposition that [the carrier's] rates were unreasonable." Id, at 3. Branch Motor also interpreted footnote 10 in Maislin to mean that "the Supreme Court was taking no position on whether re-referral to the ICC was appropriate." Id at 4.

We agree that footnote 10 in Maislin does not require a remand in every case where unreasonableness of rates is alleged; however, the lack of evidence in Branch Motor was the Third Circuit's reason for not remanding to the ICC. In this case, Sunshine is prepared to put on evidence regarding the unreasonableness of the rates. Branch Motor also relies on the fact that because the shipper did not succeed in establishing the unreasonableness of the rates before the ICC, the "mere mention of rate unreasonableness [on appeal], entirely unsupported . . . is not sufficient to give it a second bit at the apple." Id, at 4.

Sunshine has not yet had an opportunity to present its evidence to the ICC. In Branch Motor, by contrast, the shipper has no evidence whatsoever on this issue. Rebel's argument, which emphasizes that reparations provides the only remedy, does not provide an opportunity for the ICC to address the reasonableness of rates. As a carrier subject to the jurisdiction of the Interstate Commerce Commission, Rebel had an obligation under section 10701 to keep its rates "reasonable". A remand to the ICC effectuates this purpose.

We do not, however, interpret Maislin to require a re-referral to the ICC in every suit by a carrier to collect undercharges. The point of Maislin was to prevent undercutting of the filed rate doctrine through separate agreements between shippers and carriers. Requiring a ruling from the ICC on reasonableness in every case would weaken the "strict adherence" to the filed rate doctrine required by Maislin. 110 S.Ct. 2771. In this case, however, we conclude that a remand to the ICC for consideration of the reasonableness issue is appropriate.

The decision of the ICC is **REVERSED**, and the matter is **REMANDED** back to the ICC for a determination of the reasonableness issue.

A true copy
Attest:
Leonard Green, Clerk

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30140

SUNSHINE MILLS, INC.
v.
REBEL MOTOR FREIGHT, INC.[1]

Decided: July 25, 1989
Service date: July 31, 1989

By complaint filed December 20, 1988, Sunshine Mills, Inc. (Sunshine) seeks a determination that it would be an unreasonable practice under 49 U.S.C. 10701(a) to allow Rebel Motor Freight, Inc. (Rebel) to collect undercharges of $6,007.60 for nine shipments of dog food transported in 1983 from Sunshine's facility at Tupelo, MS to points in Texas. This case was referred to the Commission by the Circuit Court of Tennessee for the Thirtieth Judicial District, at Memphis, in Docket No. 18345-8 T.D., Rebel Motor Freight, Inc. v. Sunshine Mills, Inc. The complaint raises issues of negotiated rates address in NITL-Pet. to Inst. Rule on Negotiated Motor Car., 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (Negotiated Rates).

PRELIMINARY MATTERS

In its complaint, Sunshine named James W. Moore, owner and president of Rebel, as co-defendant. Mr. Moore subsequently filed a motion to dismiss the complaint as to him individually. He argues that the Commission lacks jurisdiction over him personally and that he is not a party to the court proceeding. Complainant replied. We will grant the motion.

---

[1] This proceeding formerly was titled Sunshine Mills, Inc. v. Rebel Motor Freight, Inc., and James W. Moore. See discussion infra.

As an individual, Mr. Moore is not subject to the Commissions' jurisdiction. Moreover, his participation as a defendant is not necessary to the resolution of the issues before us.

Rebel also filed a motion to dismiss the complaint against it on the ground that the Commission lacks jurisdiction to grant the relief sought. Sunshine replied. We address this jurisdictional issue infra, and find Rebel's position without merit. Accordingly, we will deny the motion.

BACKGROUND

Sunshine manufactures dog food and other related products. Darrell Smith, Sunshine's plant manager, submitted a verified statement in support of the complaint. In early 1983, Johnny Price, Rebel's sales representative, called Mr. Smith to solicit Sunshine's traffic. They discussed a price range from $1.15 to $1.20 per mile, based on the cost of Sunshine's own private carriage operations. As a result of that discussion, Julian Hodge, Rebel's Tupelo terminal manager, confirmed in writing to Roy Turner, Sunshine's assistant plant manager, a rate of $1.18 per mile to Texas points. A copy of that letter, dated June 28, 1983, was submitted here. Rebel thereafter handled nine truckload shipments for Sunshine between October 6, and December 30, 1983. Rebel billed Sunshine at the quoted rate, and Sunshine paid the billed amounts. Not until 1986, when Rebel began to liquidate its operations, did Sunshine learn that the quoted rate had not been published in a tariff.

Rebel does not dispute this evidence. It simply advances jurisdictional arguments against our hearing the complaint.

DISCUSSION AND CONCLUSIONS

In our first Negotiated Rates decision, we adopted a policy statement holding that the filed rate doctrine does not necessarily bar defenses against undercharge claims filed by common carriers. We considered and discussed jurisdictional

arguments against this policy in Wakefern Food Corp. v. Southwest Frgt. Lines, Inc., 3 I.S.C.2d 814 (1987), where we rejected assertions that the charges contained in an applicable tariff must be assessed regardless of the circumstances. We concluded that the decisions in Negotiated Rates and Buckeye Cellulose Corp. v. L&N R.R. Co., 1 I.C.C.2d 767 (1985), aff'd sub nom. Seaboard System Railroad v. United States, 794 F.2d 635 (11th Cir. 1986), confirm that our primary jurisdiction over unreasonable practices under section 10701(a) and section 10704 gives us the authority to consider all the circumstances surrounding an undercharge suit. In our most recent Negotiated Rates decision served June 29, 1989, we discussed and reaffirmed our authority to consider negotiated rates cases under our unreasonable practice jurisdiction.

Application of the negotiated rates policy is intended to temper the harsh effects of the filed rate doctrine when it can be shown that the shipper and carrier negotiated and agreed upon a rate that was not published in a tariff. Our role in such cases is to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts, and to determine: (a) whether collection of undercharges based on the rate contained in the published tariff would constitute an unreasonable practice; and (b) if a negotiated rate is found to exist, whether this amount is all the carrier should be permitted to collect.

In Wakefern, supra, we determined that an opinion in favor of the shipper under the Negotiated Rates precedent requires two basic findings: (1) that a rate other than the tariff rate was quoted by a carrier representative upon whom the shipper could legitimately rely and that an agreement to use that rate was reached; and (2) that the shipper reasonably relied on the quote.[2]

---

[2] While in Negotiated Rates we made it clear that it would be unreasonable to require shippers to determine, prior to each transportation movement, whether the agreed rate is actually on file, we did not eradicate the doctrine that the rate filed is a matter of public record and that the

We are satisfied that a negotiated rate was agreed to in this case by Sunshine and Rebel. Not only has the shipper testified concerning the circumstances surrounding the initiation of service by Rebel and its understanding, prior to the movement of its traffic, of the charges for such service, but we also have Rebel's written confirmation of the agreed-to rate. The evidence, then, is clear that an agreement was reached to transport Sunshine's traffic at the rate of $1.18 per mile, and that Sunshine was billed at and paid that negotiated rate.

Moreover, we find that Sunshine reasonably relied on the representations of Mr. Hodge, Rebel's terminal manager, in view of his position of authority with Rebel and the fact that his representations were repeatedly confirmed by Rebel's subsequent billings. Accordingly, we conclude that it would be an unreasonable practice to require Sunshine to pay undercharges now for the shipments handled by Rebel pursuant to their negotiated agreements.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to dismiss the complaint as to James W. Moore is granted.

2. The motion to dismiss the complaint as to Rebel is denied.

3. This proceeding is discontinued.

---

shipper is charged with constructive notice of the actually filed rate. In situations such as these, we are determining whether, under the circumstances, adherence to the filed rate doctrine would constitute an unreasonable practice.

4. A copy of this decision will be mailed to the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips.

Noreta R. McGee
Secretary

(SEAL)

APPENDIX C

LIST OF CASES REFERRING RATE REASONABLENESS ISSUE TO ICC

Brown v. Manville Products Corp., No. C-89-2386 VRW, ND CA, 11/15/90

Delta Traffic Service, Inc. v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990)

Delta Traffic Service, Inc., Assignee of Claxton Transport, Inc. v. Snider d/b/a Smoky Snider Distributing Co., Inc.; A90A1246; *Delta Traffic Service, Inc., Assignee of Claxton Transport, Inc. v. Gusto Brands, Inc. et al*, A90A1287; *Delta Traffic Service, Inc., Assignee of Claxton Transport, Inc. v. Dixie-Riverside, Inc.*, A90A1376, GA Court of Appeals, 10/25/90, 1991 Fed.Car.Cas. ¶83,587

Freightcor Services, Inc., Debtor in Possession, v. The BF Goodrich Co., OH Ct of Common Pleas, Cty of Summitt, No. CV 90 8 2803, 1991 Fed.Car.Cas ¶83,611, 2/4/91

Horn's Motor Express, Inc., Mark Services, Inc. v. Anchor Glass Container, No. 1:CV-90-1030, USDC MD PA, 1991 Fed.Car.Cas ¶83,629, 2/14/91

Horn's Motor Express, Inc., Mark Services, Inc. v. Harrisburg Paper Co., No. 1:CV-90-1031, USDC, MD PA, 5/28/91

James G. Duffy, Trustee for Canny Trucking Co., Inc. v. BMC Industries, Inc. d/b/a Buckbee-Mears-Courtland Co. and James G. Duffy, Trustee for Canny Trucking Co., Inc. v. Marietta Corp., No. 90-7133, U.S. Second Circuit Court of Appeals, 6/28/91

In Re: American Freight System, Inc., Debtor, No. 88-41050-11. American Freight System, Inc. v. U.S. National Resources, Inc. a/k/a Friedrich Air Conditioning, Adv. No. 90-7248, USBC, D KS, 4/16/91

In Re: Murphy Motor Freight Lines, Inc., Bky 3-87-577. Brian Leonard, Trustee of the Bankruptcy Estate of Murphy Motor Freight Line, Inc. v. General Mills, Inc., Adv. No. 3-89-201, USBC, D MN, 3rd Div., 4/3/91

In Re: R.F.I. Transport, Inc., Debtor. Kay Clements, Trustee for the Bankruptcy Estate of R.F.I. Transport, Inc. v. S.R.B. Tech Transport, No. 89 S 954, 89 S 1069, USDC, D CO, 1991 Fed.Car.Cas ¶83,626, 12/6/90

In Re: Sharm Express, Inc., Debtor, Bky No. 4-87-3241-RJK; *Edward W. Bergquist, Trustee in the Bankruptcy Estate of Sharm Express, Inc. v. 7/24 Freight Sales, Inc.*, USDC, D MN, 4th Div., Adv. No. 4-89-337, 122 B.R. 999, 1/17/91

In Re: Southwest Equipment Rental, Inc. d/b/a Southwest Motor Freight, Debtor, No. 88-00033; *C. Kenneth Still, Trustee v. Armstrong World Industries, Inc.*, USBC, ED TN, Adv. No. 89-0178, 1991 Fed.Car.Cas. ¶83,597, 1/8/91

Maislin Industries, US, Inc. et al v. Primary Steel, Inc., USDC, WD MO, WD, No. 85-0021-CV-W-JWO-5, 11/21/90

Overland Express, Inc. v. International Multifoods, No. IP 90-801-C, USDC, SD, IN, 12/5/90

Rebel Motor Freight, Inc. v. Lowe's Companies, Inc., Chancery Court of Shelby County, TN, No. 93576-3, 2/28/91

Scott Brown, Jr., Trustee for Express Transportation Co., Inc. v. Manville Products Corporation, USDC, ND CA, No. C-89-2386-VRW, 11/15/90

Steven Gale, Assignee of Certified Carriers of America, Inc. v. Norwesco, Inc., USDC, D MN, 4th Div., 1991 Fed.Car.Cas. ¶83,607, 12/11/90

William J. Hunt, Trustee for Ritter Transportation, Inc. v. Superbond, Inc., Civil Action No. 89-5244, USDC, ED PA, 5/16/91

LIST OF CASES REFUSING TO REFER TO ICC

Atlantis Express, Inc. v. N & M Nationwide, Inc., 90-1815 and *The Bankruptcy Estate of United Shipping, Inc. v. National Automotive & Rubber Marketing, Inc.*, 90-1814 in the USDC, D MN, 4th Div, 11/23/90

Atlantis Express, Inc. v. Unicorn Transportation Systems, Inc. et al, No. Div. 4-90-232 and 233, USDC, D MN, 4th Div, 1991 Fed.Car.Cas ¶83,627, 3/19/91

Advance-United Expressways, Inc. v. Duro Metal Manufacturing Co., Inc., USDC, ND TX, Dallas Div, No. CA 3-89-2442-G, 11/30/90

Advance-United Expressways, Inc. v. Eastman Kodak Co., USDC, ND TX, Dallas, Div, No. CA 3-89-2025-G, 11/30/90

Bergquist v. LaSalle-Deitch Co. (In Re: Sharm), Civ.No. 4-90-727, USDC, D MN, 2/7/91

Branch Motor Express Co. v. Caloric Corporation, 89-1130, Third Cir., 8/14/90

Delta Traffic Service, Inc. & Oneida Motor Freight, Inc. v. Appco Paper & Plastic Corp., No. 88-9057, 2nd Cir., 1991 Fed.Car.Cas ¶83,621, 4/18/91

Edward W. Bergquist, Trustee of the Bankruptcy Estate of Sharm Express, Inc. v. Twin Modal, Inc., USBC, D MN, Bky No. 4-87-3241-RJK, Adv. No. 4-89-401-RJK, 10/14/90 (reversed by subsequent District Court decision)

In the Matter of Maislin Industries, US, Inc., Debtor, No. 83-03161-R. Stuart Gold, Trustee v. A. J. Hollander & Co. et al, Adv. No. 85-0076-R, USBC, ED MI, So. Div, 11/14/90

In Re Oneida Motor Freight, Inc., Debtor, USBC, D NJ, Case No. 85-03606; *Oneida v. The Ormond Shops*, Adv. No. 87-0527; *Oneida v. Thomas J. Lipton*, Adv. No. 87-0642; *Onedia v. Lionel Leisure, Inc.*, Adv. No. 87-0664, 11/8/90 (reversed and referred), 1990 Fed.Car.Cas ¶83,586 (reversed by subsequent District Court decision)

Supreme Court, U.S.
FILED
SEP 25 1991
OFFICE OF THE CLERK

(2)

No. 91-329

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION;
UNITED STATES OF AMERICA
Respondents,

v.

SUNSHINE MILLS, INC.
Intervenor

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S.COURT OF APPEALS FOR THE SIXTH
CIRCUIT

BRIEF OF RESPONDENT SUNSHINE MILLS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Sunshine Mills, Inc.

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. SUMMARY STATEMENT OF RESPONDENT'S POSITION	2
II. STATEMENT OF THE CASE	4
III. REASONS WHY WRIT SHOULD BE DENIED	13
A. REBEL WAITED OVER TWO YEARS AFTER SHIPMENT TO CLAIM UNDERCHARGES AND PREVENTED SUNSHINE FROM UTILIZING THE REPARATIONS STATUTE, 49 U.S.C. 11705(b) (3) BECAUSE OF THE TWO YEAR STATUTE OF LIMITATIONS, 49 U.S.C. 11706 (c) (2).	13
B. THE RULING BELOW FOLLOWS THE DECISIONS OF THIS COURT.	16
C. A 15-MONTH REVISIT OF FOOTNOTE 10 IS NOT IN THE PUBLIC INTEREST FOR A CARRIER IN LIQUIDATION, SUCH AS PETITIONER REBEL, WHO SHALL NOT SERVE IN THE FUTURE THE PUBLIC WHOM THE FILED RATE DOCTRINE IS DESIGNED TO PROTECT, RATHER THAN REBEL'S CREDITORS AND STOCKHOLDERS.	23

D. PRIMARY JURISDICTION CRITERIA-NOT "PROOF"-BEFORE A COURT IS REQUIRED FOR A RATE REASONABLENESS REFERENCE. IT WAS SATISFIED BELOW. REBEL MISSTATES RECORD. 26

IV. CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

CASES

Branch Motor Exp. Co. v. Caloric Corp., 914 F.2d 241 (3d Cir. 1990) 12

Distrigas of Massachussets Corp. v. Boston Gas Co., 693 F.2d 1113 (1st Cir. 1983) 26

Far East Conf. v. United States, 342 U.S 570, 574-75 (1952) 28

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S. Ct. 325, 331, 84 L.Ed. 361 (1940) 19

James B. Orr et al v. Interstate Commerce Commission et al, 912 F.2d 119 (6th Cir.1990) 9

James G. Duffy, Trustee v. BMC INDUSTRIES,INC., 938 F.2d 353 (2 Cir. 1991) at 357-8 15

Lowden v. Simmonds-Shields-Lonsdale Grain Co., 306 U.S. 516 (1939) 18, 21

Maislin Industries, Inc. et al v. Primary Steel, Inc., 705 F. Supp. 1402, 497 U.S.___, 110 S. Ct. 2759, 111 L.Ed.2d. 94 (1990) 2,4,8, 9,10,12 13,20, 21

NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99, 100 (1986) 7

Pennsylvania R. Co. v. United States, 363 U.S. 202 (1960) 16,21

Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement Ex Parte No. MC-177 (Sub-No. 2), 8 I.C.C. 2d 61 (1991) 5

Rohr Industries v. Wash Metro Area Transit Authority, 720 F.2d 1319 (D.C. Cir., 1983) 28

United States v. Western Pac. R. Co., 352 U.S. 59 at 63 (1956) 17,21,23

Westinghouse Electric Corp. v. United States, 388 F.Supp. 1309 (USDC, W. D. Pa., 1975) 10,11,27

STATUTES

Interstate Commerce Act

49 U.S.C. 1114.21..... 3

49 U.S.C. 10101 (a) (2) (D)..... 23

49 U.S.C. 10701..... 13

49 U.S.C. 10701 (e)..... 10

49 U.S.C. 10761..... 24

49 U.S.C. 10762..... 24

49 U.S.C. 11705 (b) (3)..... 13

49 U.S.C. 11706 (c) (2)..... 13

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BRIEF OF RESPONDENT SUNSHINE MILLS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. SUMMARY STATEMENT OF RESPONDENT'S POSITION.

This Court has no need for a 15-month revisit now to footnote 10 in Maislin cited below at the urging of this non-operating carrier. The ICC has on September 4, 1991 fully "explored" the rate reasonableness issue by its extended discussion of that issue, in the wake of Maislin. It has provided sufficient alternative directions for the shippers and carriers to follow concerning undercharges and rate reasonableness. Reparations statutes do not require a shipper to pay the carrier before alleging an unreasonable rate defense to an undercharge claim by the latter. If they do, then, Petitioner Rebel Motor Freight, Inc. waited after the nine shipments involved here for more than the two years' limitation period to claim undercharges, thereby depriving Respondent Sunshine Mills, Inc. of its right to

pay the tariff rate and make such a claim. Rebel's rates are from 167% to 186% higher than that of Rebel's competing carriers in the territory in the last half of 1983. The rate Sunshine paid was the rate level required to move the traffic, not the filed rate. 49 C. F. R. 1114.21, the I.C.C. discovery rules, will permit Sunshine to determine from Rebel if backhauls were involved, and what its costs were, if it has any 1983 records to support its undercharge claim for that period. Under all of the criteria, Rebel's rates were unreasonable. The Sixth Circuit's reference to the ICC for this non-operating carrier preserves the basic requirement of statutory reasonableness for Rebel's rates. Sunshine carried the burden on establishing primary jurisdiction for a reference of this case to the administrative agency, without offering proof, under these circumstances. Proof is not required in

every instance for a primary jurisdiction reference. Petitioner's position here is only a complaint by it that "it would be grossly unfair and inequitable to require Rebel to recommence the litigation after having already waited over four years for its day in court." The carrier in Maislin has waited two years longer. See 705 F. Supp. 1402. That is the real world. This Court's resources have better use than to accelerate Petitioner's litigation schedule for its unreasonable rates.

II. STATEMENT OF THE CASE.

This case is not what Rebel represents it to be: a "continuation of the dispute" discussed by this Court in Maislin Industries, Inc. et al v. Primary Steel, Inc., 497 U.S. ___, 110 S. Ct. 2759, 111 L.Ed.2d. 94 (1990). There is no "dispute". The Opinion below follows Maislin's pronouncement of the filed rate doctrine.

On September 4, 1991, after the filing of the subject Petition, the ICC served Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement Ex Parte No. MC-177 (Sub-No. 2), 8 I.C.C. 2d 61 (1991). It is lodged with this Response. It denied petitions for a policy statement. However, it fully discussed the law concerning rate reasonableness, and concluded at 78-9: "The matters and case law discussed above should afford sufficient guidance to the public, setting forth as it does some idea of what arguments the Commission considers relevant..."

Between October 6, 1983, and December 30, 1983, Petitioner Rebel transported nine truck shipments for Respondent Sunshine at a rate negotiated and mutually agreed upon between them on June 18, 1983, which was paid. All of the shipments were from Tupelo, MS to points in Texas. The last shipment was on December

30, 1983. In February, 1986, Rebel ceased operating its Certificate, and began to liquidate. It owned equipment and a terminal which had a lien on it in favor of Rebel's creditors in three states.

In the first part of 1986, Rebel engaged the services of Professional Truck Auditing, Incorporated, Bryant, AR to audit its freight bills. Its compensation was a 50% contingent fee to the auditor of monies received by Rebel for undercharges discovered by the auditor and paid at a subsequent date by its former customers including Sunshine. It was not until early 1986, after Rebel attempted to collect and Sunshine refused to pay the $6007.60 claim for undercharges created by Professional Truck Auditing that Sunshine learned that the rate quoted on June 18, 1983 and paid in 1983 had not been published in a tariff.

Rebel did not dispute the above pleadings

and evidence offered by Sunshine before the ICC. (Petition, 9a)

Two years duration from the last shipment on December 30, 1983 for a Memphis-Texas shipment ended on or about December 30, 1985, several days or weeks before Rebel in February, 1986 began to liquidate, and engaged the services of Professional Truck Auditing.

After Sunshine refused in 1986 to pay Rebel's undercharge claim, Rebel on September 20, 1986, filed suit against Sunshine in the General Sessions Court of Shelby County, Tennessee. Its jurisdictional amount limit is $15,000.00.

On October 29, 1986, the ICC announced and concluded that in future referrals in undercharge cases, it would "decide if the collection of undercharges would be a reasonable practice." NITL- Petition to Institute Rulemaking on Negotiated Motor Common Carrier

Rates, 3 I.C.C. 2d 99, 100 (1986) (Negotiated Rates 1). That was the origin of its Negotiated Rates policy. Maislin, supra, p. 2763.

Sunshine followed that then announced precedent of the ICC, and the Negotiated Rates Policy, and moved the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis to refer the case to the ICC for the determination of whether the undercharges at issue were an unreasonable practice. Any defense of unreasonable rates to Rebel's undercharge claim would have been at that time futile, in view of that announced precedent and policy of the administrative agency with jurisdiction of the subject matter. That was the state of the law.

That court on August 4, 1988, referred under the doctrine of primary jurisdiction the case to the Interstate Commerce Commission for a "determination of whether the undercharges

sought to be collected by plaintiff under all the circumstances would be an unreasonable practice." (Petition, 8a)

Rebel offered no evidence to the Commission. (Petition, 9a)

On July 31, 1989, the I.C.C. concluded that it would be an unreasonable practice for Rebel to collect these alleged undercharges from Sunshine. On September 25, 1989, Rebel appealed that decision to the United States Sixth Circuit Court of Appeals. (Petition, 11a)

The Sixth Circuit stayed this case pending the disposition of another undercharge case involving similar facts and issues. James B. Orr et al v. Interstate Commerce Commission et al, 912 F.2d 119 (1990). After Maislin, and a decision in the Orr case, adverse to Rebel's position today before this Court, the Sixth Circuit at Rebel's request set on Sep-

tember 25, 1990, a briefing schedule for this case.

In its Initial Brief, Rebel only pressed the argument that the Sixth Circuit should declare the ICC Decision herein null, void, and of no effect whatsoever because it was contrary to law. That was the sole basis of its appeal. It ignored the requirement that a filed rate be reasonable which this Court expounded in Maislin.

In its Initial Brief to the Sixth Circuit, Sunshine in reply argued that in the post-Maislin disposition of undercharge claims, there should be a determination by the ICC of whether the filed rate urged by the carrier was reasonable. That determination depends on an economic evaluation of the relevant market, the carrier's costs, and numerous other factors, as explicated at 49 U.S.C. 10701(e). The other factors include those found at Westing-

house Electric Corp. v. United States, 388 F. Supp. 1309 (USDC, W. D. Pa., 1975): existence of competition; the availability of return loads in the type of equipment used; rate level required in order to move the traffic; and comparison of the rate under consideration with established rates for comparable shipments in the territory involved.

It urged the Sixth Circuit to remand the case to the ICC for a determination of the reasonableness of the tariff rates sought by Rebel.

The ICC did not file a brief except to advise the Court that to the extent that a rate reasonableness issue remains, the case should be remanded back to the Commission, in accordance with the Sixth Circuit's holding in Orr, supra.

There was no oral argument before the Sixth Circuit, all parties having waived same.

The Sixth Circuit reversed the ICC decision which held for Sunshine on the basis that the negotiated rate was an unreasonable practice. It remanded the case to the ICC for a rate reasonableness determination. It further held that Sunshine is not required to pursue reparations as its sole remedy against Rebel, page 5. After observing that Maislin emphasized the statutory requirement that filed rates be "reasonable", it stated: "A footnote in Maislin also suggests a remand may be appropriate", and quoted footnote 10 in its entirety. It distinguished this case from the unpublished Branch Motor Express Company v. Caloric Corp., 914 F.2d 241 (3rd Cir. 1990), where the "shipper never supplied any support for its proposition that {the carrier's} rates were unreasonable...the lack of evidence in Branch Motor was the Third Circuit's reason for not remanding to the ICC..Sunshine is

prepared to put on evidence regarding the unreasonableness of the rates...Sunshine has not yet had an opportunity to present its evidence to the ICC...As a carrier subject to the jurisdiction of the Interstate Commerce Commission, Rebel had an obligation under section 10701 to keep its rates 'reasonable'. A remand to the ICC effectuates this purpose." (Emphasis added)

III. REASONS WHY THE WRIT SHOULD BE DENIED.

A. REBEL WAITED OVER TWO YEARS AFTER SHIPMENT TO CLAIM UNDERCHARGES AND PREVENTED SUNSHINE FROM UTILIZING THE REPARATIONS STATUTE, 49 U.S.C. 11705(b) (3)BECAUSE OF THE TWO YEAR STATUTE OF LIMITATIONS, 49 U.S.C. 11706(c)(2).

Assuming arguendo that Petitioner's position is well taken, the filed rate doctrine does not embrace an undercharge claim under these facts. It may be harsh, but it is not that harsh! Maislin does not contemplate such a result! Before that case is revisited within 15 months by this Court, the carrier claimant should at least have not waited until the

statute of limitations on the shipper has run, and then make claim, and file suit.

That is what happened here.

The last shipment from Memphis, TN to the Texas point was on December 30, 1983. In February, 1986, Rebel ceased operations and engaged the services of Professional Truck Auditing, Inc. to audit its freight bills for the discovery of any undercharge claims. It was not until early 1986, that Sunshine learned that the rate quoted and paid in 1983 had not been published in a tariff. Two years duration from the last shipment on December 30, 1983 ended on December 30, 1985, or a very few days thereafter. That was several weeks before Rebel in February, 1986 began to liquidate, and engaged the services of the auditor. It was the auditor who computed the exact amount on each of the alleged undercharges on each of the nine shipments, as listed at Joint Appen-

dix 16 below. The "balance due" bills of the auditor which were presented for the first time to Sunshine were all dated July 17, 1986. Rebel filed suit on September 20, 1986.

Sunshine urges that the reparations theory of Rebel is not applicable law. However, even if it were, it should not be applied in this case. Rebel did not bill or sue Sunshine for the charges now claimed to be due until more than two years after the shipments, by which time Sunshine's right to contest the rates before the Commission and seek reparation for any of the shipments had expired.

Under almost the same facts, the Second Circuit has held four months ago in James G. Duffy, Trustee v. BMC INDUSTRIES, INC., 938 F.2d 357-8 (2 Cir. 1991) at 357-8: the filed rate doctrine "need not be applied so strictly as to permit a carrier to delay billing beyond the two-year period of limitations governing

the shipper's reparations remedy...and then preclude an unreasonable rate defense in the carrier's subsequent suit..."

B. THE RULING BELOW FOLLOWS THE DECISIONS OF THIS COURT.

The most basic, significant, and indispensable element - "the essence" - of the question before this Court on certiorari, so Petitioner declares at page 7, is "whether a shipper may refuse to pay the filed tariff rate claiming it to be unreasonable."

Twice has this Court answered in the affirmative, and the Sixth Circuit's ruling below to that effect is consistent with these precedent cases.

In Pennsylvania R. Co. v. United States, 363 U.S. 202 (1960) a railroad sued in the Court of Claims the United States to recover additional charges. The Court suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the

reasonableness of the rates. It did so. The railroad was dissatisfied with the Commission's decision, and moved the Court of Claims to stay its proceeding pending a review of the ICC decision by a District Court. The Court of Claims refused to stay the case and entered a judgment in favor of the railroad for the lower amount which the Commission held to be recoverable. This court reversed, holding that the Court of Claims should have stayed the proceeding, pending the District Court's review of the reasonableness of the rates.

This Court in that case announced that it was "properly relying on our holding in United States v. Western Pacific R. Co., 352 U.S. 59, 62-70 (1956). Western Pacific involved a claim against the United States as a shipper for underpayments. The United States defended arguing that proper construction of the tariff required imposition of a lower rate, and in

the alternative, that the higher rate was unreasonable. This court held that the primary jurisdiction doctrine required that both of the questions be remanded to the ICC for determination. At page 69, this Court held: "The question of the reasonableness of rates is matter entrusted by Congress solely to the Interstate Commerce Commission." (Emphasis added).

In Lowden v. Simmonds-Shields-Lonsdale Grain Co., 306 U.S. 516 (1939) the amount involved was $624.00. The suit was begun by the railroad against the shipper who, as Sunshine below, refused to pay the tariff charge claimed by the carrier, a $1.00 per car charge for the installation of protective grain doors in the cars. Before trial in the District Court, the I.C.C. passed upon the validity and reasonableness of the charge for this particular service, and upheld it to the extent of $.60

per car. It awarded reparation to those who had paid $1.00 per car and authorized the carriers to waive collection of the amount over $.60 per car from shippers who had not paid. The carrier reduced its demand in the District Court to the $.60 per car. This Court affirmed the ICC's action.

In General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S.Ct. 325, 331, 84 L.Ed. 361 (1940), this Court held:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act."

In that case, a lessee of railroad tank cars sued the lessor for sums due under a car leasing agreement. The District Court held for

the lessor, and the Court of Appeals reversed. This Court sent the case back to the District Court because "it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Interstate Commerce Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act." page 329.

"Open for exploration" is the remand which was mandated by Maislin at fno. 10. That footnote could not be more comprehensive, more sweeping. It has no exact limits except that the objectives of the filed rate doctrine, as expounded within the rationale of the decision which was footnoted, must be accomplished.

Petitioner asserts that the Sixth Circuit below reasons "that footnote 10 effectively overruled this long line of precedential deci-

itself, concerning reparations". That "long line of precedential decisions" at pages 7-13 of the Petition date from 1907 to 1942. No infirmity, of course, attaches to older precedents. These cited by Rebel are just inapposite when these later decisions cited by Sunshine are considered. Pennsylvania, (1960), Western, (1956), and Lowden, (1939), supra, all fit Maislin's "exploration" which was ordered to further the filed rate doctrine. It will not be thwarted if the ICC decides the issue of reasonableness under the facts of this case. These precedents cited by Sunshine should be "explored" under the facts at bar by denying this Writ and sustaining the decision below.

Had Maislin intended that the 1907-42 cases relied on by Petitioner control on this plethora of undercharge and reasonableness-rate defense litigation, this Court in 1990

would have expanded and discussed them in footnote 10, or in the body of the Opinion, and cited and applied at least one of them. This Court knew on June 22, 1990 that this issue would be highly visible in the federal court system. At least seven Circuit Courts of Appeal in June, 1990 had rendered opinions on the issue. See footnote 1, page 2772.

Inclusion by this Court of the future resolution of the reasonableness issue in a footnote rather than in the main body of the opinion is important. That style in the opinion is significant. It can only mean that the ICC would determine any future reasonableness issues in undercharge suits. Had this Court decided to change on the reasonableness issues the primary jurisdiction relationship between the courts and that agency, it would have done so in the main body of the opinion, rather than in a footnote. "We have concluded that in

the circumstances here presented the question of...the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission", United States v. Western Pac. R. Co., supra. (Emphasis added.)

C. A. 15-MONTH REVISIT OF FOOTNOTE 10 IS NOT IN THE PUBLIC INTEREST FOR A CARRIER IN LIQUIDATION, SUCH AS PETITIONER REBEL, WHO SHALL NOT SERVE IN THE FUTURE THE PUBLIC WHOM THE FILED RATE DOCTRINE IS DESIGNED TO PROTECT, RATHER THAN REBEL'S CREDITORS AND STOCKHOLDERS.

The National Transportation Policy 49 U.S.C. 10101(a) (2) (D) provides "for...regulation...in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to...enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions..." Petitioner in liquidation no longer is an objective of that Policy. Rebel has no future support or use of the filed rate doc-

trine. It will have no shipper customers who need protection from discrimination and unreasonable rates. No future enforcement of the filed rate doctrine will be served by applying it under the facts of this case, unless the ICC should decide to make an example of these facts for use as a deterrent to its violation, provided Rebel's rates are reasonable. That is a fact issue which only the ICC can decide.

Maislin's message is at 2769: "Compliance with Sec. 10761 and 10762 is "utterly central" to the administration of the Act. This is the future transportation scenario which concerns this court. No deterrent in the administration of Sections 10761-2 of the Act will occur should Rebel be required to prove before the ICC that its filed rate is reasonable. If it does so, or if it fails, then, the filed rate doctrine suffers not at all. If it is successful, the expert body can determine the extent

and nature of the recovery from Sunshine, for the proceeds will not go to the future transportation needs of the country which the Act exists to serve but to a non-carrier's stockholders and creditors, most of whom are not players in the for-hire carrier market. Especially not required for these few individuals' purposes are the judicial resources of this Court when the Sixth Circuit has sent these issues to the ICC.

One of the issues the ICC can resolve is the "payment first" requirement which Rebel urges. Should it convince the ICC that that is applicable law, then its solvency will be a proper issue. The records of Rebel's 1984 year-end financial condition reveal a $1.7 million to $1.9 million ratio of current assets to current liabilities for Rebel. Should reparations now become an issue before the ICC, Rebel's ability to pay seven or eight

years later any reparations will be an additional issue before the ICC.

D. PRIMARY JURISDICTION CRITERIA - NOT "PROOF" - BEOFRE A COURT IS REQUIRED FOR A RATE REASONABLENESS REFERENCE. IT WAS SATISFIED BELOW. REBEL MISSTATES RECORD.

In Distrigas of Massachusetts Corp. v. Boston Gas Co., 693 F.2d 1113 (1 Cir. 1983), the First Circuit sua sponte invoked the doctrine of primary jurisdiction in a suit between gas companies for money that each believed the other owed under tariffs filed with the Federal Energy Regulatory Commission governing terminalling and storage of liquefied natural gas. It held at 1117: "It is now well established that the doctrine is not waived by the failure of the parties to present it in the trial court or on appeal, since the doctrine exists for the proper distribution of power between judicial and administrative bodies and not for the convenience of the par-

ties".

The misleading part of Rebel's Petition in this regard is at page 27 where it misstates:

> "From the record it appears that all it[Sunshine] is going to attempt to prove is that the filed tariff rate is higher than the negotiated and now rejected rate. Clearly that is not a statutory basis for unreasonableness" (Emphasis added.)

These five factors other than the tariff rate being higher than the negotiated rate set forth in the Westinghouse case were explicated, and relied upon by Sunshine before the Sixth Circuit. They were the basis of that tribunal's finding that, "In this case, Sunshine is prepared to put on evidence regarding the unreasonableness of the rates." (Petition, 6a.)

Rebel misconstrues the law regarding a reference to the ICC by a court on the issue

of rate reasonableness under the doctrine of primary jurisdiction.

No precise quantum of proof is required if a Court is able to understand the issues. It is well settled law that an agency has primary jurisdiction to apply the law to the facts on a matter "arguably" within its statutory authority. Far East Conf. v. United States, 342 U.S. 570, 574-75(1952). Only a "likelihood" was required in Rohr Industries v. Wash Metro. Area Transit Authority 720 F.2d 1319 (D. C. Cir., 1983).

Rebel's argument at page 6 that Sunshine should not be allowed to change its defense at the appellate level means that Sunshine should not have been allowed to invoke the doctrine of primary jurisdiction before the Sixth Circuit. The weight of authority is to the contrary.

Rebel can hardly be "utterly central"

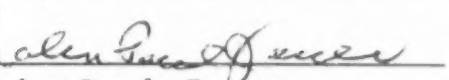
concerning the reasonableness of its subject rates. It has represented on November 19, 1990 in another undercharge case in the United States District Court for the Western District of Tennessee that it has destroyed its 1983 records. They are necessary to determine its costs. It may be "monumentally difficult to enforce the requirement that rates be reasonable" for the nine shipments for which Rebel claims undercharges. That also is one of the reasons why it attempts to have this Court foreclose any inquiry into the reasonableness of its 1983 rates.

IV. CONCLUSION.

For that and the other reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served this date a copy of the foregoing pleading by certified mail, return receipt requested, upon the following counsel of record:

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Witness my signature this the 16th day of October, 1991.

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(3)

No. 91-329

In the Supreme Court of the United States

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in an action by an insolvent motor carrier to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission (ICC) of the reasonableness of that rate, even though the motor carrier's insolvency precludes satisfaction of any subsequent reparations order.

2. Whether, if referral to the ICC is permissible, the shipper must present evidence of the unreasonableness of the rate to the trial court before the court is required to stay the undercharge action and refer the issue to the Commission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Advance-United Expressways, Inc. v. *Duro Metal Mfg. Co.*, No. 90-7068 (5th Cir. Aug. 23, 1991) 13

Advance-United Expressways, Inc. v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex., Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320 (5th Cir.) 14

Arizona Grocery Co. v. *Atchison, T.&S.F. Ry.*, 284 U.S. 370 (1932) 6, 7, 11

Branch Motor Express Co. v. *Caloric Corp.*, 914 F.2d 241 (3d Cir. 1990) (Table) 4, 13, 15

Burlington Northern Inc. v. *United States*, 459 U.S. 131 (1982) 8

Caravan Refrigerated Cargo, Inc., In re, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254 (1990) 13

Chicago, R.I.&P.R.R. v. *Furniture Freight Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970) 10

Crancer v. *Lowden*, 315 U.S. 631 (1942) 11

Delta Traffic Serv., Inc. v. *Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990) 10, 13

Duffy v. *BMG Indus., Inc.*, 938 F.2d 353 (2d Cir. 1991) 12, 13

Great Northern Ry. v. *Merchants Elevator Co.*, 259 U.S. 285 (1922) 7

Gulf, C.&S.F. Ry. v. *Hefley*, 158 U.S. 98 (1895) 10

Kansas City S. Ry. v. *Carl*, 227 U.S. 639 (1913) 10

Keogh v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) 9

Cases—Continued: Page

Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94 (1915) 6, 9
Lowden v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939) 7, 8, 9
Maislin Industries, Inc. v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990) 3, 4, 6, 8, 9
Mohasco Indus., Inc. v. *Acme Fast Freight, Inc.*, 491 F.2d 1082 (5th Cir.), cert. denied, 419 U.S. 842 (1974) 11
New York, N.H.&H.R.R. v. *ICC*, 200 U.S. 361 (1906) 6
Orr v. *ICC*, 912 F.2d 119 (6th Cir. 1990) 4
Pennsylvania R.R. v. *International Coal Mining Co.*, 230 U.S. 184 (1913) 7
Pennsylvania R.R. v. *United States*, 363 U.S. 202 (1960) 7, 9
Southern Pacific Transp. Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982) 6
Southern Pacific Transp. Co. v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984) 14
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 6, 10-11
Texas & Pac. Ry. v. *Mugg*, 202 U.S. 242 (1906) 10
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 (1959) 4, 11
Union Pac. R.R. v. *Bay Area Shippers Consolidating Ass'n*, 594 F.2d 1291 (9th Cir. 1979) 10
United States v. *Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974) 11
United Sttaes v. *Western Pacific R.R.*, 352 U.S. 59 (1956) 12

Statutes:

Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 6
Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652 4
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.* 1
49 U.S.C. 10701(a) 2, 3
49 U.S.C. 10704(b)(1) 2
49 U.S.C. 10761(a) 2, 6
49 U.S.C. 10762(a)(1) 2

Statutes—Continued: Page

49 U.S.C. 11705(b)(3) 2, 4
49 U.S.C. 11706(c)(2) 4, 12
49 U.S.C. 11706(g) 12
28 U.S.C. 1336 3
28 U.S.C. 1336(b) 3
28 U.S.C. 2321 3
28 U.S.C. 2342(5) 3

Miscellaneous:

National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates:
3 I.C.C.2d 99 (1986) 3
5 I.C.C.2d 623 (1989) 3
Regulations for Payment of Rates and Charges, 57 I.C.C. 591 (1920) 10

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported, but the judgment is noted at 933 F.2d 1009 (Table). The decision of the Interstate Commerce Commission (Pet. App. 8a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1991. The petition for a writ of certiorari was filed on August 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, regulates interstate transportation by motor

carriers. A motor common carrier providing transportation subject to regulation under the Act must publish its rates in tariffs filed with the Interstate Commerce Commission (ICC). 49 U.S.C. 10761(a), 10762(a)(1). In order to protect shippers against discriminatory rates, the Act states that a carrier providing transportation "may not charge or receive a different compensation for that transportation * * * than the rate specified in the tariff." 49 U.S.C. 10761(a).

The Act also requires that a carrier's rates and practices must be reasonable. 49 U.S.C. 10701(a). The authority to enforce the requirement of reasonable rates and practices belongs to the ICC. 49 U.S.C. 11705(b)(3); 10704(b)(1). A carrier is liable for damages for imposition of rates and practices that the Commission finds to be unreasonable. 49 U.S.C. 11705(b)(3). If the ICC determines that a carrier is charging an unreasonable rate or is engaging in a practice that is unreasonable, the ICC "shall prescribe the rate * * * or practice to be followed" by the carrier. 49 U.S.C. 10704(b)(1).

2. Petitioner Rebel Motor Freight, Inc., was a motor common carrier subject to ICC regulation. In 1983, petitioner negotiated with Sunshine Mills, Inc. (Sunshine), a manufacturer of dog food, over shipping rates for the transportation of Sunshine's products. Petitioner agreed to ship Sunshine's products at a rate based on the cost of Sunshine's own private carriage operations. Petitioner thereafter billed and collected at that rate, but failed to file the negotiated rate in its tariffs with the ICC. Years later, petitioner sought to collect $6,007.60 in additional charges for the transportation, reflecting the higher rate found in petitioner's tariffs on file with the ICC at the time. Sunshine refused to pay the additional charges. In

1986, petitioner sued Sunshine in a Tennessee state court to collect the purported undercharges. When Sunshine offered no defense, the state court rendered judgment for petitioner. Pet. App. 2a-3a, 9a.

Sunshine appealed to the Circuit Court of Tennessee for the Thirtieth Judicial District, which, at Sunshine's request, referred the case to the ICC. Relying on its *Negotiated Rates* policy statements, see *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989), the ICC found that petitioner's solicitation and billing practices constituted an unreasonable practice in violation of 49 U.S.C. 10701(a) and, therefore, that Sunshine should not be required to pay additional charges for the difference between the negotiated rates and the tariff rates. Pet. App. 9a-11a.

3. Petitioner filed a petition for review in the court of appeals.[1] The court postponed briefing until this Court had issued its decision on the validity of the ICC's *Negotiated Rates* policy in *Maislin Industries, Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990). In *Maislin*, this Court held that the ICC's *Negotiated Rates* policy "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the require-

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[1] Pursuant to 28 U.S.C. 1336(b), when a United States District Court refers questions to the ICC for determination, the referring court has exclusive jurisdiction to enforce or set aside the ICC's decision arising out of the referral. In this case, a state court referred questions to the Commission and there is no analogous provision in the United States Code providing for review in the state court of the decision on referral. Instead, review of the ICC's decision lies in the court of appeals. 28 U.S.C. 1336, 2321, 2342(5).

ments that make up the filed rate doctrine in particular." In light of *Maislin* and *Orr* v. *ICC*, 912 F.2d 119 (6th Cir. 1990), the court of appeals reversed the ICC's determination that petitioner's collection of its filed rates was barred under the *Negotiated Rates* policy. Pet. App. 4a.

The court of appeals then held that it was appropriate to remand the case to the ICC for a determination whether petitioner's filed rates were reasonable. The court noted that in *Maislin*, this Court had emphasized that the Act requires that filed rates be "reasonable" and had suggested that the reasonableness of the carrier's filed rates in that case was an issue that remained open for review on remand. Pet. App. 4a, citing *Maislin*, 110 S. Ct. at 2767 & n.10. The court of appeals further rejected petitioner's claim that *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1959), requires the conclusion that a shipper may not assert reasonableness as a defense in an action to recover tariff charges. The court observed that "the precedential value of *T.I.M.E.* has been greatly eroded" because Congress legislatively repudiated that decision.[2] Pet. App. 5a-6a.

Finally, the court distinguished the Third Circuit's unpublished decision in *Branch Motor Express Co.* v. *Caloric Corp.*, 914 F.2d 241 (1990) (Table), where the court of appeals, in another post-*Maislin* case, had refused to remand to the ICC for the Commission to consider the reasonableness of the carrier's rates. In that case, the court explained, the Third Circuit had emphasized the shipper's failure to pro-

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[2] See Act of Sept. 6, 1965, Pub. L. No. 89-170, §§ 6-7, 79 Stat. 651-652, codified at 49 U.S.C. 11705(b)(3) and 11706(c)(2). The amended statute gives shippers the right to recover reparations for unreasonably high rates.

vide any support for its claim of unreasonableness, whereas here Sunshine was "prepared to put on evidence regarding the reasonableness of the rates." Pet. App. 6a. The court concluded that, if this case were not remanded to the ICC, the Commission would lose the opportunity to address the reasonableness of petitioner's rates and thereby implement the statutory requirement that rates must be reasonable. *Ibid.* The court emphasized, however, that *Maislin* does not require referral to the ICC in every case, because that would weaken the "strict adherence" to the filed rate doctrine required by *Maislin*. *Id.* at 7a.

ARGUMENT

The court of appeals' interlocutory decision, which grants a remand to the ICC on the issue of rate reasonableness, is correct and consistent with this Court's decisions. There is no square conflict between the decision in this case and a published decision of another court of appeals. The petition for a writ of certiorari should therefore be denied.

1. Petitioner contends (Pet. 7-18) that the shipper in this case may not defend against the action for undercharges by having the court refer to the Commission the issue of whether petitioner's tariff rates are reasonable. Instead, petitioner asserts that even though petitioner's bankruptcy precludes any effective remedy in reparations once the collection action is completed, the filed rate doctrine requires a court to enforce the tariff rate, leaving the shipper only with a theoretical and ineffective remedy in reparations proceedings. That contention is incorrect.

a. The Interstate Commerce Act requires that carriers file their rates in public tariffs and charge and

collect only the filed rates.[3] Those requirements were designed to prevent carriers from engaging in rate discrimination that favored some shippers over others. See, *e.g.*, *New York, N.H.&H.R.R.* v. *ICC*, 200 U.S. 361, 391 (1906); *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336, 343-344 (1982). As the Court explained in *Maislin*, to implement the tariff requirements of the Act, this Court developed the principle that neither misquotation by the carrier nor the shipper's ignorance of the tariff rate affords a defense to the carrier's court action to collect the filed rate. 110 S. Ct. at 2765-2766. That principle has come to be known as the "filed rate" doctrine. *Id.* at 2766.

It has long been recognized, however, that "[t]he filed rate doctrine * * * contains an important caveat: the filed rate is not enforceable if the ICC finds the rate to be unreasonable." *Maislin*, 110 S. Ct. at 2767, citing *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915). The Commission alone is empowered to determine the reasonableness of rates; courts are barred from addressing the issue. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co.* v. *Atchison, T.& S.F. Ry.*, 284 U.S. 370 (1932). Thus, to protect the Commission's ability to enforce the Act's reasonableness requirement, courts have applied the doctrine of primary jurisdiction. That doctrine requires that "[w]henever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

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[3] See Act of Feb. 4, 1887 (Act to Regulate Commerce of 1887), ch. 104, 24 Stat. 379. The current codification of this requirement, as applied to motor common carriers, is found at 49 U.S.C. 10761(a).

Great Northern Ry. v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

Normally, when disputes arise over the reasonableness of a tariff rate, the Commission's primary jurisdiction is adequately protected by requiring the shipper to pay the asserted tariff rate and then contest its reasonableness in a separate reparations proceeding. See *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 197 (1913); *Arizona Grocery Co.*, 284 U.S. at 384. The ICC supports that procedure as the general practice in this area. But in the present context, a court's refusal to refer the rate reasonableness issue for an ICC determination before the shipper has paid would defeat the ICC's primary jurisdiction. The motor carrier in this case is insolvent and hence is unable to satisfy any subsequent reparations order. In these circumstances, enforcement of the filed tariff without referral to the ICC would nullify the reasonableness requirement of the statute: it would undermine the ICC's exercise of its unreasonable-rate jurisdiction and deny the shipper an adequate remedy.

A sound application of the Act does not require Sunshine to pay petitioner's tariff rates before the ICC can determine whether those rates are reasonable. No carrier has a right to collect rates that the ICC finds are unlawful, cf. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205 (1960), and, of course, petitioner's creditors in bankruptcy have no greater standing. Nor is immediate payment required to achieve the goals of the filed rate doctrine. The primary purpose of the doctrine is to prevent unlawful rate discrimination through the granting of unpublished rebates

or discounts. *Maislin*, 110 S. Ct. at 2766. There is no possibility, however, that impermissible discrimination will occur as a result of staying Sunshine's payment of the tariff rate while the reasonableness of that rate is being resolved.[4] Immediate payment is also unnecessary to aid petitioner in timely collection of its published charges—one of the goals of the filed rate doctrine. *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. at 520-521. When a carrier continues to operate, the requirement of immediate payment assists to maintain the carrier's financial solvency and thus contributes to a stable transportation system. Here, however, because the carrier is no longer operating, immediate payment is not necessary to preserve its operating capital. There is no justification, therefore, for frustrating the ICC's enforcement of the reasonableness requirement of the Act.

This Court has emphasized that judicial review of ICC determinations should be structured to preserve the ICC's primary jurisdiction and to protect parties unable to benefit from later reparation proceedings. See, *e.g.*, *Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 142 (1982).[5] That principle fully

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[4] Sunshine will ultimately have to pay whatever rates are found to be both applicable and reasonable, which is the same requirement that applies to all other shippers that employed petitioner's transportation services. Moreover, no one has suggested that Sunshine will obtain a de facto discriminatory rate because of an inability to pay the charges that are ultimately found to be due; unlike petitioner, Sunshine is a going concern that is not enmeshed in bankruptcy proceedings.

[5] In *Burlington*, the court of appeals, after vacating the last two of three successive ICC orders, concluded that its decision effectively "revived" the rate level established by the Commission's first order. This Court reversed because the

accords with the court of appeals' conclusion that it was appropriate to refer the rate-reasonableness issue to the Commission.

b. Petitioner errs in contending (Pet. 7-18) that referral to the ICC is inconsistent with this Court's cases. In *Maislin*, the Court made clear that a finding by the ICC that the filed rate is unreasonable is a defense in a collection action. 110 S. Ct. at 2767. The filed rate doctrine has always included the qualification that the filed rate is not enforceable if the rate has been found to be unreasonable. See *Maxwell*, 237 U.S. at 97 (filed rate applies, "unless it is found by the Commission to be unreasonable"); *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 163 (1922) (tariff rate governs shippers' and carriers' rights "[u]nless and until suspended or set aside"). And in *Maislin*, the Court noted that, because the ICC had not determined the reasonableness of the carrier's rates on referral from a court, "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." 110 S. Ct. at 2767 n.10. Indeed, courts have frequently referred rate reasonableness issues to the ICC, or given effect to ICC rate-reasonableness rulings, prior to payment by the shippers.[6]

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court's action undermined the ICC's jurisdiction to insure reasonable rates and because the railroads, which have no right to reparations, had no way to recover their losses if the rates the court required them to charge were less than those ultimately found reasonable.

[6] *Pennsylvania R.R.* v. *United States*, 363 U.S. at 203 (where railroad sued United States to recover additional charges, the lower court properly "suspended proceedings to enable the parties to have the [ICC] pass on the reasonableness of the rates"); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 521 (1939) (where shippers were

The cases cited by petitioner (Pet. 7-13, 16-17) are distinguishable. In those cases, the carriers were going concerns that had assets available to pay any reparations later found to be due; accordingly, this Court required the shipper to pay the filed rate before the carrier released the goods.[7] None of those

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already entitled to reparations pursuant to a Commission decision, the carriers' "voluntary reduction of their claim" was a "sensible adjustment of their right to recover the tariff charge and of their obligation to make reparation to the extent that it is unreasonable"); *Chicago, R.I.&P.R.R.* v. *Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970) (where railroad sued for additional unpaid freight charges and shippers claimed rates were unreasonable, court required to stay its hand until ICC reached a final decision); *Union Pac. R.R.* v. *Bay Area Shippers Consolidating Ass'n*, 594 F.2d 1291 (9th Cir. 1979) (railroad sought additional freight charges; district court required to refer rate reasonableness issues to Commission); see also *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101, 104-105 (1st Cir. 1990) (collecting cases).

[7] See *Gulf, C.&S.F. Ry.* v. *Hefley*, 158 U.S. 98 (1895); *Texas & Pac. Ry.* v. *Mugg*, 202 U.S. 242, 245 (1906) (citing *Hefley* for the proposition that shipper is not entitled to recover the goods upon the tender of payment less than the schedule charges); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (shipper had alleged that the carrier had exacated, over its protest at the time of delivery, an unjust and unreasonable rate); *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 653 (1913) ("The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried * * * until the full legal rate has been paid."). Credit was not generally offered. See *Regulations for Payment of Rates and Charges*, 57 I.C.C. 591, 593 (1920) (the "majority of shippers or consignees in the past have paid their freight when they received their goods"). The statements in this Court's cases cited by petitioner (Pet. 7-13) that the shipper must pay first and seek reparations later, *e.g.*, *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204

cases involved a carrier seeking undercharges under the circumstances found here, where the shipper had already paid the full amount originally billed and where reparations as a practical matter would be uncollectible.[8] In sum, in those cases the courts did not face, and did not decide, the issue presented in this case.[9]

Even if the filed rate doctrine ordinarily prohibited a reference to the Commission, it would not do so in the present case, where the carrier did not commence the undercharge action until after the statute of lim-

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U.S. at 444; *Arizona Grocery Co.* v. *Atchison, T.&S.F. Ry.*, 284 U.S. at 384; *Crancer* v. *Lowden*, 315 U.S. 631, 635-636 (1942), must be understood in light of the background principle that disputes over the reasonableness of rates should not be a means of obtaining delivery without payment.

[8] See, *e.g.*, *Crancer* v. *Lowden*, 315 U.S. 631, 636 (1942), where the Court, in requiring payment prior to determination of rate reasonableness, noted that the shipper could always recover reparations if the rate were later determined to be unreasonably high.

[9] Also wide of the mark is petitioner's reliance on *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1954). As the court of appeals observed, "the precedential value of *T.I.M.E.* has been greatly eroded" because Congress has legislatively overruled that decision and the Act now permits retrospective examination of the reasonableness of motor carrier rates. Pet. App. 5a. Petitioner fares no better in arguing (Pet. 14-15) that the courts of appeals have construed the statutory language to bar reasonableness defenses in motor cases. The cases relied upon by petitioner, *Mohasco Indus., Inc.* v. *Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir.), cert. denied, 419 U.S. 842 (1974), and *United States* v. *Associated Transport, Inc.*, 505 F.2d 366 (D.C. Cir. 1974), merely distinguished between the administrative reparations remedy enacted to overrule the *T.I.M.E.* decision and common law restitution. They have no relevance to the question here, which goes to the *timing* of the reparations remedy.

itations had run on the right to seek reparations. In *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956), carriers sued the shipper (the United States) in the Court of Claims for additional charges. The shipper interposed a rate reasonableness defense (among others), but the Court of Claims found referral to the ICC barred by the two-year statute of limitations for recovering overcharges. This Court reversed, holding that the rate reasonableness issue had to be referred to the ICC. The Court explained that "[o]nly the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit." 352 U.S. at 71.

Here, as in *Western Pacific*, the statute of limitations would bar affirmative reparation claims for the lion's share, if not all, of Sunshine's shipments if Sunshine could not assert its rate reasonableness defense to the carrier's collection action.[10] Under the rule in *Western Pacific*, because petitioner delayed in filing suit until the shipper's reparations claim became time-barred, it cannot rely on the filed rate doctrine to thwart review of its rates by the ICC. Accord *Duffy* v. *BMG Indus., Inc.*, 938 F.2d 353, 357 (2d Cir. 1991).

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[10] A shipper must begin a civil action to recover damages from a motor carrier within two years after the claim accrues. 49 U.S.C. 11706(c)(2). The claim accrues on delivery or tender of delivery by the carrier. 49 U.S.C. 11706(g). Sunshine's shipments moved in 1983. Rebel did not begin asking Sunshine for additional charges until 1986. Pet. App. 9a. Even if Sunshine had paid Rebel and filed a civil action the day it received Rebel's first dunning letter, the statute of limitations would have barred its claims.

2. Petitioner also errs in contending (Pet. 18-26) that there is a conflict in the courts of appeals that merits this Court's review. The Sixth Circuit in this case and the First Circuit in *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101 (1990), are in accord in finding that a reference to the ICC on the issue of rate reasonableness is permissible. The Second Circuit specifically left that question open in *Duffy* v. *BMG Indus., Inc.*, 938 F.2d at 357, instead resolving that case on a narrower ground.[11]

Petitioner's reliance on the unpublished decision of the Third Circuit in *Branch Motor Express Co.* v. *Caloric Corp.*, 914 F.2d 241 (1990) (Table), is misplaced. In that case, the court did not address whether referral to the ICC is ever permissible, but found only that the particular shipper had made an insufficient showing to justify that relief. In *Advance-United Expressways, Inc.* v. *Duro Metal Mfg. Co.*, No. 90-7068 (5th Cir. Aug. 23, 1991) (per curiam), the court did address the question whether referral to the ICC is ever appropriate, and concluded that it is not. *Duro Metal*, however, is unpublished and therefore has no precedential force. Moreover, it also relied on the alternative ground that the shipper there "completely failed to show that there exists any issue of material fact concerning the reasonableness or the applicability of the [tariff] rates." Slip op. 4. In *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254

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[11] As we have noted, the ground on which the court relied in *Duffy*—that the statute of limitations had run on a reparations action before the carrier filed suit—is also available here. Petitioner does not contend that there is any conflict in the circuits on that issue.

(1990), the court indicated that the filed rate doctrine bars a stay of undercharge proceedings in district court to allow the ICC to adjudicate the reasonableness of rates.[12] That statement, however, was dictum, because the shipper there had requested a referral to the Commission only on the issue of the reasonableness of the carriers' practices under the ICC's then-applicable *Negotiated Rates* policy, and had not claimed that the carrier's tariff rates were unreasonable. The issue presented in this case is now squarely before the Fifth Circuit in *Advance-United Expressways, Inc.* v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex., Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320, and the ICC has filed a brief as amicus curiae in support of the shipper. Given the absence of any published decision that creates a circuit conflict on this issue and the pendency of other litigation that raises the question presented in the petition, we do not believe that this Court's intervention is warranted at this time.[13]

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[12] The court in *Caravan* relied on *Southern Pacific Transp. Co.* v. *San Antonio*, 748 F.2d 266 (5th Cir. 1984), which held that a court cannot stay a carrier's undercharge action pending the outcome of an ICC proceeding to determine the reasonableness of the tariff rate; the shipper's only remedy is to seek reparations from the carrier in a separate proceeding. In that case, however, the carrier was not insolvent and the undercharge action was not delayed until after the statute of limitations had run on any reparations claims. Accordingly, the *San Antonio* case and the ICC's position in that case are consistent with our position here. See Pet. 20 n.4.

[13] The same observation applies to the second question presented by the petition, which raises the issue of what quantum of preliminary proof must be presented to a trial court to justify referral to the ICC on a rate-reasonableness claim. Pet. i. Petitioner points (Pet. 26-28) to only one other court

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of appeals decision that addresses this issue, *Branch Motor Express Co.* v. *Caloric Corp.*, *supra*. That decision, like the decision below, is unpublished. In any event, as the court of appeals explained, Pet. App. 6a-7a, the two decisions are consistent. The shipper in *Branch* had not sufficiently indicated a willingness to establish the unreasonableness of the rate it purported to challenge. The court of appeals in this case found otherwise with respect to Sunshine, while recognizing that a referral is not required in every case based on a shipper's mere assertion of rate unreasonableness. *Id.* at 7a.

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No. 91-329

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In the Supreme Court of the United States

OCTOBER TERM, 1991

REBEL MOTOR FREIGHT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
Conclusion	6
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Advance-United Expressways, Inc. v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex. Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320 (5th Cir.)	3
Caravan Refrigerated Cargo, Inc., In re, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254 (1990)	3
Carolina Motor Express, Inc., In re, Nos. 89-3259, 89-3261 & 89-3262 (4th Cir. Nov. 7, 1991)	1, 2, 3, 6
Delta Traffic Serv., Inc. v. *Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990)	3
Duffy v. *BMC Indus., Inc.*, 938 F.2d 353 (2d Cir. 1991)	5
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990)	3, 4, 5, 6
Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement, 8 I.C.C.2d 61 (1991)	4
United States v. *Western Pac. R.R.*, 352 U.S. 59 (1956)	5

Miscellaneous:

J. Schulz, "Charging Discount 'Schemes' Illegal, Transcon Seeks Huge Shipper Refunds," *Traffic World* (Nov. 11, 1991)	3

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This supplemental brief is filed pursuant to Rule 15.7 of the Rules of this Court to call attention to a recent decision of the United States Court of Appeals for the Fourth Circuit in *In re Carolina Motor Express, Inc.*, Nos. 89-3259 89-3261, 89-3262 (Nov. 7, 1991).[1]

1. The principal issue in this case is whether, under the filed rate doctrine, when an insolvent motor carrier sues to collect undercharges based on the tariff rate, the shipper must pay the tariff rate prior to a determination by the Interstate Commerce Commission (ICC) of the reasonableness of that rate. The court of appeals in this case correctly held that

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[1] The opinion of the court of appeals in *Carolina Motor Express* is reproduced in an appendix to this brief. App., *infra*, 1a-16a.

the shipper's unreasonable-rate defense should be referred to the ICC.

In *In re Carolina Motor Express, Inc.*, *supra*, a divided panel of the Fourth Circuit reached the opposite conclusion, holding that referral is not permitted. There, a motor carrier had provided transportation to shippers at unfiled, negotiated rates. After the carrier's bankruptcy, an auditor discovered that the applicable tariff rates were higher than the negotiated rates. The trustee and the auditor then sued the shippers to recover the difference. App., *infra*, 4a-5a. The court of appeals held that the shippers' defense that the tariff rates were unreasonable did not justify a stay of enforcement pending referral to the ICC. *Id.* at 7a. The majority reasoned that such a procedure would be "wholly inconsistent with the filed rate doctrine," which requires that "shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier." *Ibid.* Judge Hall dissented from that ruling. *Id.* at 11a-16a. He would have held that the shipper's defense that the rate is unreasonable "implicates a matter within the primary jurisdiction of [the] ICC, and, therefore, referral to that agency and a stay of the court proceedings is the proper course of action." *Id.* at 12a.

2. In our brief in opposition, we noted that, although the courts of appeals had reached different conclusions as to the appropriateness of referring claims of unreasonableness to the ICC, there was no conflict between published decisions of the courts of appeals that had squarely addressed this issue. Accordingly, we suggested that this Court's intervention was not currently required. Br. in Opp. 13-14.

With the decision in *Carolina Motor Express*, there is now a conflict in the circuits that is unlikely to be

resolved by further litigation in the lower courts. The First Circuit has held that referral to the ICC of a rate-unreasonableness defense is appropriate. *Delta Traffic Serv., Inc.* v. *Transtop, Inc.*, 902 F.2d 101 (1990). The Fourth Circuit's decision in *Carolina Motor Express* is to the contrary. The Fifth Circuit, in dicta, has taken the same position as the Fourth Circuit. *In re Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), cert. denied, 110 S. Ct. 3254 (1990). While the issue presented in this case is now squarely before the Fifth Circuit in *Advance-United Expressways, Inc.* v. *Eastman Kodak Co.*, No. CA 3-89-2025-G (N.D. Tex. Nov. 30, 1990; Dec. 13, 1990; Mar. 12, 1991), appeal pending, No. 91-1320, and the ICC will urge that court to permit referral, even if the Fifth Circuit were to agree with the Commission and to allow referral of rate-unreasonableness claims, the conflict between the First and the Fourth Circuits would persist.

3. In an appropriate case, we believe that this conflict should be resolved by this Court. This case, however, does not present a proper vehicle for resolution of the issue.

As this Court is aware, see *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), in recent years a significant number of motor carriers have become insolvent and have sought to collect undercharges from shippers who had relied on negotiated, unfiled rates. The total amount at stake in those cases has not been determined, but "[i]t now is estimated that freight undercharges are approaching $1 billion in liability."[2] "[M]any ship-

[2] J. Schulz, "Charging Discount 'Schemes' Illegal, Transcon Seeks Huge Shipper Refunds," *Traffic World* 15 (Nov. 11, 1991). On September 19, 1991, the Chairman of the ICC advised the Senate Committee on Commerce, Science, and Transportation that published estimates of undercharge liability

pers have challenged the reasonableness of the rate sought by bankrupt motor carriers and their collection agents in undercharge actions." *Petitions for Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement*, 8 I.C.C.2d 61, 62 (1991). The Commission has advised us that, at present, nearly 200 rate-unreasonableness cases are pending before it related to undercharge claims and that those cases involve an estimated $10 million. The current controversy over the meaning of the filed rate doctrine, therefore, has significant financial implications for the shipper community and motor carrier industry.[3]

The issue is also important to the ICC's administration of the Interstate Commerce Act. In the wake of this Court's decision in *Maislin*, courts have experienced difficulty in reconciling the filed rate doctrine with the demands of the primary jurisdiction doctrine. Where courts have refused to refer rate-unreasonableness claims to the ICC, the ICC's pri-

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range from $200 million to as much as $1 billion. The ICC is aware of at least 186 motor carriers that have filed claims against shippers based on the existence of higher tariff rates than the rates that were negotiated.

[3] To be sure, it is uncertain whether shippers and carriers will continue to face this problem with respect to future shipments. As this Court noted in *Maislin*, "[o]ne would think that a shipper who has the market power to require a carrier to reduce his tariffs could also require proof from a carrier that the negotiated rate had been filed before tendering the shipment, especially since there are commercial services providing up-to-the-minute details of the carrier's rate schedule." 110 S. Ct. at 2769 n.12. With proof of the filed rate in hand, the shipper could presumably avoid the situation where a bankrupt carrier, years after the shipment, would assert the right to collect a higher-than-agreed-upon filed rate, which the shipper believes is unreasonable. Nevertheless, the existing backlog of cases is of a sufficient magnitude to cause concern to the transportation industry.

mary jurisdiction to enforce the Act is undermined, and shippers are deprived of an adequate remedy. The confusion over proper application of the primary jurisdiction doctrine will continue absent clarification by this Court.[4]

Nevertheless, we do not believe that this case is an appropriate vehicle for review of this issue. The judgment in this case is supported by a ground on which there is no conflict in the circuits and which does not warrant this Court's review: referral to the ICC is permitted here because petitioner did not commence its undercharge action until after the statute of limitations had run on the shipper's right to seek reparations. As we explain in our brief in opposition (at 11-12), it is settled law that referral to the ICC is authorized in that setting under this Court's decision in *United States* v. *Western Pac. R.R.*, 352 U.S. 59 (1956). The Second Circuit so held in *Duffy* v. *BMC Indus., Inc.*, 938 F.2d 353, 357 (1991), and no court of appeals has disagreed.

The existence of this narrower ground for decision obviates the need for reaching the broader question raised by the petition in this case. Cf. *Duffy*, 938 F.2d at 358 ("It will be time enough to revisit the issue [of whether a rate-unreasonableness claim should, in general, be referred to the ICC] * * * when a shipper who has not paid asserts an unreas-

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[4] The confusion may also spread to other issues. For example, the ICC advises us that some trustees of bankrupt carriers are now claiming that their own filed discount tariffs are unlawful and that they are therefore entitled to collect higher rates based on their non-discount tariffs. These trustees are also claiming, in reliance on the filed rate doctrine and *Maislin*, that courts are barred from referring to the ICC the issue of whether their discount tariffs are consistent with the Act. This argument, if accepted, would significantly expand the financial exposure of shippers while impeding the Commission's ability to interpret and apply the Act.

onable rate defense to a suit by a carrier who has promptly billed for the freight alleged to be owing."). Because the issue on which the circuits are divided is being widely litigated, this Court will have another opportunity to address the question in a case that properly presents it. Review of the court of appeals' unpublished decision in this case is not warranted.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] We note that our brief in opposition was in error in indicating that petitioner is in bankruptcy proceedings. See Br. in Opp. 5, 7, 8 n.4. Petitioner has liquidated its operations, Pet. App. 2a, 9a, and is no longer an operating motor carrier. Although petitioner has not filed for bankruptcy, the more characteristic situation in which insolvent motor carriers have sued for undercharges does involve bankruptcy proceedings, see, *e.g.*, *Maislin*, 110 S. Ct. at 2764, and at least one court of appeals took bankruptcy procedures into account in denying referral. See *Carolina Motor Express*, App., *infra*, 10a-11a n.4. This Court may wish to await a case involving a bankrupt carrier seeking to collect undercharges in order to consider the interaction of the bankruptcy laws and the primary jurisdiction doctrine.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 89-3259, 89-3261, 89-3262

IN RE: CAROLINA MOTOR EXPRESS, INC., DEBTOR

LANGDON M. COOPER, Trustee; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

DELAWARE VALLEY SHIPPERS, DEFENDANT-APPELLEE

LANGDON M. COOPER, Trustee for Carolina Motor Express, Inc.; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

PETER C. REITER, DEFENDANT-APPELLEE

LANGDON M. COOPER, Trustee for Carolina Motor Express, Inc.; MARK & ASSOCIATES OF NORTH CAROLINA, INC., PLAINTIFFS-APPELLANTS

v.

CALIFORNIA CONSOLIDATED ENTERPRISES, INC., DEFENDANT-APPELLEE

Appeals from the United States District Court
for the Western District of North Carolina, at Shelby
Woodrow Wilson Jones, Senior District Judge
CA-88-147-SH-C, CA-88-138-SH-C, CA-88-139-SH-C

December 7, 1989, Argued

November 7, 1991, Decided

Before WIDENER and HALL, Circuit Judges, and MICHAEL, District Judge*

WIDENER, J.

In this consolidated appeal, we address issues arising from the requirement of the Interstate Commerce Act (Act), 49 U.S.C. § 10101 et seq. (1982) that motor common carriers file their rates with the Interstate Commerce Commission (ICC) and that both shippers and carriers adhere to these rates. These cases involve a motor carrier that seeks to collect, based upon its tariff on file with the ICC, undercharges from a shipper with whom it privately negotiated a rate lower than that which the tariff required.

The bankruptcy court entered a final judgment for the plaintiffs in two of the three cases, concluding that because the filed rate doctrine precluded defendants' assertion of equitable defenses to the carrier's undercharge claims, the carrier was entitled to recover regardless of its own actions. Cooper v. California Consolidated Enterprises, 84 Bankr. 979 (Bankr. W.D.N.C. 1988). On appeal, the district

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* United States District Judge for the Western District of Virginia, sitting by designation.

court reversed the final judgments of the bankruptcy court and referred to the ICC the question of whether the carrier's collection of the undercharges would amount to an unreasonable practice. Although the ICC has yet to issue a decision in the two cases, plaintiffs now appeal.[1]

On recommendation of the bankruptcy court, the district court withdrew reference to the bankruptcy court of the third case and, on the defendant's motion, referred the case to the ICC. The ICC later issued a decision in the case stating that the carrier's collection of undercharges constituted an unreasonable practice. Based upon the ICC's finding, the district court granted summary judgment for defendant and dismissed plaintiffs' action. Plaintiffs appeal.[2]

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[1] In their brief, defendants Reiter and California Consolidated Enterprises question the propriety of this court's jurisdiction by characterizing plaintiffs' appeal as the impermissible appeal of the district court's interlocutory order of referral to the ICC. Although this issue is not worthy of extensive discussion, we note that a significant difference exists between our more usual review of a district court sitting in judgment as a trial court and our review of a district court acting as an appellate tribunal in bankruptcy. This distinction has caused many circuit courts to adopt more relaxed definitions of a final district court order in bankruptcy if, as is the case here, a bankruptcy court already has entered a final order. See, e.g., Sambo's Restaurants, Inc. v. Wheeler, 754 F.2d 811, 813-15 (9th Cir. 1985); In re Marin Motor Oil, Inc., 689 F.2d 445, 449 (3d Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

[2] Defendant Delaware Valley Shippers also advances a jurisdictional argument. Delaware Valley contends that plaintiffs' appeal as to it should be dismissed because plaintiffs failed to seek review of the ICC's decision within the ninety-day period specified in 28 U.S.C. § 1336(c). The short answer to the argument is that plaintiff did not appeal from the ICC's decision, but from the district court's entry of summary judgment.

We vacate the district court's reversal of the bankruptcy court's judgment in the first two cases, and vacate the district court's entry of summary judgment for defendant in the third case. For the reasons discussed below, we remand these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated in 89-3261 and 89-3262, that the plaintiffs' cross-appeal from the judgment of the bankruptcy court concerning late payment charges and attorneys' fees be ruled upon in 89-3261 and 89-3262, and that judgment be entered in favor of the plaintiffs in 89-3259.

I.

Because the material facts in all three cases are undisputed and are for all practical purposes identical, we need not set forth a detailed chronology of the relationship between the parties. The Fifth Circuit aptly described the present scenario as follows:

> The well-worn choreography for these cases involves a motor carrier's action against a shipper to collect for under-charges; that is, to collect the difference between the higher rate which the carrier has filed with the Interstate Commerce Commission . . . and the rate which the parties had negotiated.

Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d 388, 388-89 (5th Cir. 1989), cert. denied, 58 U.S.L.W. 3818 (1990). As was the case in Supreme Beef, the motor carrier in this case, Carolina Motor Express (CMX), supplied transportation services to the shippers at privately negotiated rates. The shippers believed that CMX would publish the quoted rates in its tariff on file with the ICC. CMX however, did not publish the quoted rates as a tariff

and later billed the shippers at the negotiated rate, which the shippers paid in full. After CMX became bankrupt, an independent auditor employed by the bankruptcy trustee discovered the discrepancy between the collected rates and the applicable tariff rates. The trustee and auditor then filed suit to recover the difference on behalf of CMX as debtor.

II.

Under 49 U.S.C. § 10761(a), a motor carrier subject to the Interstate Commerce Act "may not charge or receive a different compensation for . . . transportation or service than the rate specified in the tariff" filed with the ICC. In addition, the Act states that "[a] rate . . . , classification, rule, or practice related to transportation or service provided by a carrier . . . must be reasonable." 49 U.S.C. § 10701(a). In the classic case of Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915), the Court explained the significance of section 10761(a)'s predecessor which is the same for the present statute:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed.

The Court recently reemphasized the importance of this filed rate doctrine as "essential to preventing price discrimination and stabilizing rates." Maislin Industries, U.S., Inc v. Primary Steel, 58 U.S.L.W.

4862, 4864 (1990). The defendants, prior to our order holding this appeal in abeyance pending the Supreme Court's Maislin decision, contended that the carrier's attempt to collect the undercharges was an unreasonable practice under the Act and that the plaintiffs were therefore not entitled to collect the filed rate. Maislin rejected just this contention as do we. As the Supreme Court observed, allowing such an equitable defense would be "flatly inconsistent" with the statute because the defense "rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular." Maislin, 58 U.S.L.W. at 4865-66. We accordingly vacate the district court's reversal of the bankruptcy court's judgment in 89-3261 and 89-3262, and vacate the district court's entry of summary judgment for defendant in 89-3259.

The defendants next argue that, Maislin notwithstanding, this court should remand these cases back to the district court with instructions to refer them to the ICC for a determination of the reasonableness of the carrier's filed tariff rates. In fact, the defendants argue that certain passages in the Maislin opinion require such an course. Before we consider this argument, however, we must first address the plaintiffs' assertion that the defendants have waived any claim they may have had by failing to raise the issue of rate reasonableness in prior proceedings. After a review of the record in these cases, we find that the defendants have preserved the argument.

Having determined that the defendants may contest the reasonableness of the carrier's filed rates, the question remains of whether the cases should be remanded for re-referral to the ICC. This question

is one that the Supreme Court has not decided and on which there is no precedent in this circuit. Maislin, to be sure, did mention in a footnote that the issue of rate reasonableness was not presented in the case and would be "open for exploration" on remand. 58 U.S.L.W. at 4865 n.10. But while the Supreme Court has noted without disapproval a stay of proceedings and referral to the ICC after reasonableness was raised as a defense, see Maislin, 58 U.S.L.W. at 4864; United States v. Western Pac. R.R. Co., 352 U.S. 59, 71 (1956), it has also reiterated in Maislin that "under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation." 58 U.S.L.W. at 4865 (quoting Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R.R. Co., 284 U.S. 370, 384-85 (1932); see also Pennsylvania R.R. Co. v. International Coal Mining, 230 U.S. 184, 197 (1913) ("If . . . the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation."). We believe that the Court's decisions are correctly read as taking no position on whether rereferral to the ICC is required in such cases.

We are of opinion that a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier. We believe that such an approach is preferable to an alternative procedure under which the courts would automatically refer cases to the ICC whenever a rate was challenged. This alternative approach would provide a strong incentive for shippers routinely to con-

test the validity of the carriers' rates in order to delay paying the carrier's filed rate. Such a situation would be wholly inconsistent with the filed rate doctrine. Shippers are charged with knowledge of the filed rate, Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. at 97; Kansas City Southern R.R. Co. v. Carl, 227 U.S. 639, 653 (1913), and can contest its reasonableness directly before the ICC at any time, see 49 U.S.C. § 10708(a)(1); Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986). Moreover, carriers are entitled to receive the filed rate for their services immediately when due. Arizona Grocery v. Atchison, Topeka & Santa Fe R.R. Co., 284 U.S. at 384; Southern Pac. Transp. Co. v. San Antonio, Texas, 748 F.2d 266, 274 (5th Cir. 1984). Given these basic precepts, we believe that it would be anomalous to allow the defendants a further delay in paying the rates, of which they have been charged with knowledge from the beginning, but which they did not contest until they were sued by the trustee.

In adopting this position, we join the Fifth Circuit, which has determined that "[a] shipper that pleads unreasonableness as a defense cannot prevent enforcement of the filed tariff doctrine or force the district court to stay proceedings and refer the case to the Commission." Supreme Beef Processors, Inc. v. Yaquinto, 864 F.2d at 392; see also Southern Pacific Transp. Co. v. San Antonio, Texas, 748 F.2d at 274. We note that such a rule in no way forecloses the shipper from raising the issue of the reasonableness of the tariff rates. This issue could be raised either before or after the filing of the undercharge suit and could result in a reparations payment to the shipper by the carrier. See 49 U.S.C. § 10708(a)(1); Regular Common Carrier Conference, 793 F.2d at

379. In the meantime, however, the tariff rate as filed will have been enforced. While we recognize that judicial opinion on this point is not unanimous, Delta Traffic Serv., Inc. v. Transtop, Inc., 902 F.2d 101 (1st Cir. 1990); see also Western Transp. Co. v. Wilson & Co., 682 F.2d 1227 (7th Cir. 1982), we believe that the rule we adopt today best accords with the Supreme Court's longstanding insistence that "strict adherence to the filed rate . . . , despite its harsh consequences in some cases, is necessary to enforcement of the Act." Maislin, 58 U.S.L.W. at 4866; see Southern Pac. Co. v. Commercial Metals, 456 U.S. 336, 343-44 (1982); Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356, 361 (1943). And we add that we consider it of considerable importance that the filed rate doctrine has resulted in the prevention of the secret and discriminatory negotiated freight rates which were the plague of common carriers in times past.

On remand, the district court is instructed to reinstate the judgment of the bankruptcy court in 89-3261 and 89-3262, and to enter judgment for the plaintiffs in 89-3259. In addition, the district court in 89-3261 and 89-3262 should rule upon the plaintiffs' claim that the bankruptcy court erred in denying the late payment charges and attorneys' fees provided for in ICC CAXN 101 Item 435 of the carrier's tariff.[3]

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[3] If the district court finds that the language of this tariff provision applies to any of the charges at issue in these cases, the parties are bound by the tariff's terms. An unambiguous and duly published tariff is "binding on the parties and has the force of law . . . . regardless of the intentions of the parties or the equities existing between carrier and shipper." Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1372 (9th Cir. 1985); see also National Van Lines, Inc. v. United States, 355 F.2d 326, 331 (7th Cir. 1966).

Accordingly, the judgments of the district court reversing the bankruptcy court in 89-3261 and 89-3262 are

VACATED AND REMANDED WITH INSTRUCTIONS.

The district court's entry of summary judgment in 89-3259 is also

VACATED AND REMANDED WITH INSTRUCTIONS.[4]

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[4] The dissent argues that when, as in this case, the carrier is in bankruptcy, our decision today "may well leave the complaining shipper without a remedy" because "an independent reparations action might conclude after the termination of the bankruptcy proceedings, leaving a shipper with an ICC determination of unreasonableness that is unenforceable because the assets of the debtor's estate had been distributed earlier." Dissent, p. [15a], n.3. We disagree. Under the Bankruptcy Code as it now stands, the shipper who is required by our ruling today to pay the full tariff rate, and who then argues that this rate is unreasonably high, would stand in the same position as a shipper who had complied with the law by paying the full tariff rate in the first instance. The Bankruptcy Code defines a claim to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed [or] undisputed." 11 U.S.C. § 101(5)(A). "By this broadest possible definition . . . [the Code] contemplates that all legal obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case." H. Rep. No. 595, 95th Cong. 1st Sess. 309 (1977), S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787. The right to reparation for payments under an unreasonably high tariff rate, see 49 U.S.C. §§ 11705(b)(3), 10701(a), would constitute a pre-petition contingent, unliquidated, and disputed claim against the bankruptcy estate. See Grady v. A.H. Robins Co., Inc., 839 F.2d 198 (4th Cir. 1988), cert. dis-

HALL, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's application of Maislin to the cases before us to the extent that the shippers' defense of "unreasonable practice" is disallowed as violative of the filed-rate doctrine. I disagree, how-

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missed, 109 S.Ct. 201, 101 L.Ed.2d 972. As a general unsecured creditor, the complaining shipper would have the right to be paid a pro rata share of his claim along with the carrier's other unsecured creditors. 11 U.S.C. § 726(a)(2), (b). If waiting for an ICC determination of unreasonableness would "unduly delay" distribution of the bankruptcy estate, the value of the shipper's reparations claim would be estimated in the bankruptcy proceeding. 11 U.S.C. § 502(c)(1) ("There shall be estimated for purpose of allowance under this section—(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case.") In sum, the dissent's concern for the shipper who must deal with a bankrupt carrier is unfounded. The Bankruptcy Code provides adequate relief.

In the response to this note, at note 3, the dissent asserts that "there is no question" that in "an undercharge action by a non-bankrupt carrier" the shipper would be entitled to assert an unreasonable rate defense. Therefore, it argues, the shipper also should be allowed to assert the defense when the claim is brought by the trustee for a bankrupt carrier. Contrary to this assertion, however, there not only is a question whether a shipper can assert the unreasonable rate defense in an undercharge action by a non-bankrupt carrier, this is the very question that we address in our opinion today. To reiterate: "We are of opinion that a defense attacking the reasonableness of a carrier's filed rates should not operate to stay enforcement of the filed rate doctrine. Rather, shippers must pay the filed rates and contest those filed rates before the ICC independently if they wish to seek reparations from the carrier." Majority opinion at [7a]. It is apparent, once we get beneath the bankruptcy veneer, that the dissent simply disagrees with the majority holding in this case.

ever, with the majority's holding that a shipper may not raise "unreasonable rate" as a defense in an undercharge action. Furthermore, I believe that the equitable defense of unreasonable rate implicates a matter within the primary jurisdiction of ICC, and, therefore, referral to that agency and a stay of the court proceedings is the proper course of action.

Maislin involved a fact pattern similar to the instant cases. A carrier filed for bankruptcy, an audit revealed that several shippers had paid negotiated rates rather than the filed rate, an undercharge action was instituted, and the defendant shippers raised both unreasonable-rate and unreasonable-practice defenses. The primary thrust of the Supreme Court's decision is to invalidate ICC's 1986 Negotiated Rates policy and thereby affirm the continued validity of the filed-rate doctrine. The Court noted, however, that the "filed rate is not enforceable if ICC finds the rate to be unreasonable." *Id.*, 110 S. Ct. at 2767. Although both the reasonableness of the rates and the practice of charging a negotiated rate were referred to ICC by the district court in Maislin, only the unreasonable practice issue was addressed by the agency. Maislin Industries, U.S. v. Primary Steel, 705 F. Supp. 1401, 1402-03 (W.D. Mo. 1988). The Supreme Court noted, without elaboration, that "the issue of the reasonableness of the tariff rates is open for exploration on remand." Maislin, 110 S. Ct. at 2767 n.10. This somewhat cryptic footnote "has created uncertainty as to whether, in a carrier's suit to collect undercharges, a shipper may assert as a defense that the applicable tariff rate is unreasonable and obtain a stay of the suit and a reference to ICC for a determination of whether the rate is unreasonable." Duffy v. BMC Industries,

Inc., 938 F.2d 353, 355 (2nd Cir. 1991). This uncertainty leads the majority to a decision that I believe is at odds with precedent and sound practice.[1]

The majority finds, and I agree, that the three appellant-shippers have preserved the issue of rate reasonableness. The question remaining after Maislin is whether the shippers should be allowed to dispute the reasonableness of the rates in the context of the undercharge action, or whether their sole recourse should be an independent reparations[2] action under 49 U.S.C. § 11705(b)(3). For a variety of reasons, I believe the former path is correct.

I believe the sounder position is set forth in Delta Traffic Service v. Transtop, Inc., 902 F.2d 101, 104-07 (1st Cir. 1990). In addition to demolishing the legal basis for the non-referral rule adopted by the Fifth Circuit in Supreme Beef Processors, the First Circuit explains the historical basis for the referral and stay rule which it believed was "universally accepted" until Supreme Beef Processors was discovered. Id. at 105. To the First Circuit's analysis I can only add the names of other post-Maislin decisions that have followed the referral and stay rule. Duffy v. BMC Industries, 938 F.2d 353 (2nd Cir. 1991); Horn's Motor Express v. Harrisburg Paper Co., 765 F. Supp. 211 (M.D. Pa. 1991); Overland Express v. International Multifoods, 765 F. Supp. 1386 (S.D. Ind. 1990); Oneida Motor Freight v. Ormond Shops, 126 Bankr. 431 (D.N.J. 1991); In re

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[1] Upon remand, the district court in Maislin did stay proceedings and referred the rate issue to the ICC. Maislin Industries, U.S. v. Primary Steel, 1990 WL 264536 (W.D. Mo. Nov. 21, 1990) (unpublished).

[2] The term "reparations" was changed to "damages" in 1978. Pub. L. 95-473, 92 Stat. 1451 (1978).

Sharm Express, Inc., 122 Bankr. 999 (D. Minn. 1991).

One of the majority's arguments against referral and stay is that such a procedure "would provide a strong incentive for shippers routinely to contest the validity of the carrier's rates in order to delay paying the carrier's filed rate." Slip op. at 7[a]. This argument ignores the disincentives against the filing of frivolous pleadings, e.g., Fed. R. Civ. P. 11, as well as other provisions to discourage delaying tactics. See, e.g., 49 U.S.C. 11705(d)(3) (allowing an award of attorney's fees to a prevailing party in an action to enforce an ICC order for damages). Moreover, a complaining shipper should be required to present a threshold level of evidence of unreasonableness before referral is warranted; "a bold, conclusory allegation of rate unreasonableness" is insufficient. Oneida Motor Freight, 126 Bankr. at 442; see also In re Sharm Express, 122 Bankr. at 1004-05 (fifty percent disparity between rates of the carrier claiming undercharges and other ICC carriers sufficient to warrant referral); Covey v. Conagra, 763 F. Supp. 479, 482 (D. Colo. 1991) (party requesting reference must "make a threshold showing of unreasonableness . . . ."). This threshold determination would act as a further check against the referral of non-meritorious claims of rate unreasonableness.

These undercharge cases often arise in bankruptcy proceedings. Allowing the bankruptcy to proceed unabated, despite a claim of rate unreasonableness, may well leave the complaining shipper without a remedy. An independent reparations action might conclude after the termination of the bankruptcy proceedings, leaving a shipper with an ICC determination of unreasonableness that is unenforceable be-

cause the assets of the debtor's estate had been distributed earlier.[3]

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[3] The majority establishes the following procedure for cases of this kind: (1) the shipper first pays to the bankruptcy trustee the difference between the negotiated rates paid and the filed rate; (2) the shipper's assertion of an unreasonable rate is treated as an unsecured claim against the bankruptcy estate; (3) the bankruptcy court estimates the value of this claim by determining the reasonable rate; and (4) the shipper receives, along with other unsecured creditors, a pro rata share of his claim. Slip op. at 9, n.4. Presumably, the independent reparations action before the ICC continues apace. See Slip op. at 7. Should the ICC eventually determine that the filed rate was not reasonable (and, therefore "not enforceable," Maislin, 110 S. Ct., at 2767), it is not clear what the shipper's remedy is at that point. Even if the bankruptcy action is still pending, the only effect would be to substitute the ICC's determination for the bankruptcy court's estimate of the claim's value.

I believe this stands the matter on its head. It is the bankruptcy trustee who is making a claim against the shipper; the shipper, in turn, has asserted the defense of "unreasonable rate." If the shipper is correct, the filed rate is "not enforceable," id., and the trustee should receive nothing more than the unpaid portion of the reasonable rate. The majority, however, would give automatic judgment to the trustee and make the shipper pay a possibly unreasonable, unlawful and unenforceable rate. After this rate is paid, the shipper is left with a claim against the estate; even if the court estimates the value of this claim as the full difference between the negotiated rate and the filed rate, the shipper can only receive a pro rata share with the other unsecured creditors, an amount likely to be substantially less than the "claim" itself.

As the majority correctly notes, this procedure puts these shippers in the same position as those that had paid the filed rate initially. The majority ignores the fact that in the cases involving negotiated rates, the shippers are asserting a defense. See Delta Traffic Service, Inc. v. Transtop, Inc., 902 F.2d 101, 104 (1st Cir. 1990) ("Because shippers may assert the unreasonableness of a rate as grounds for recovery in a

I would reverse in 89-3259 and affirm the district court's order in 89-3261 and 89-3262 to the extent the bankruptcy court's orders in these cases were reversed, and I would remand with instructions to refer the rate unreasonableness issue to ICC and to stay other proceedings pending ICC's determination. I would, however, condition the referral upon a showing by each shipper that its rate claim was more than a "bold, conclusory allegation of rate unreasonableness." Oneida Motor Freight, 126 Bankr., at 442.

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reparations suit, courts ordinarily have permitted shippers to assert this same ground as a defense in a carrier's suit to collect the filed ('legal') rate.") (citing United States v. Western Pac. R.R. Co., 352 U.S. 59 (1956), and other cases). In an undercharge action by a non-bankrupt carrier, there is no question that the shipper would be entitled to assert this defense. In an undercharge action brought as an adversary proceeding by a bankruptcy trustee, I see no reason why the defense should be disallowed. See Bankruptcy Rule 7008. That this places the negotiated-rate shippers in a somewhat better position than the filed-rate payors is not a basis for eliminating the defense of rate unreasonableness. See Delta Traffic Service, Inc. v. Georgia-Pacific Corp., 936 F.2d 64 (2nd Cir. 1991) (ordering district court to separately maintain the amount paid by the shipper as the difference between the negotiated and filed rates until rate reasonableness issue resolved by ICC).

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